64-694

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 588.

FRANK CARVER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED AUGUST 17, 1896.

(16267.)

States Circuit Court of Appeals for the First Circuit, and that pages 1 to 32, inclusive, hereto annexed, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals determined.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this 12th day of November, 1896.

[SEAL] JOHN G. STETSON, *Clerk.*

64-694

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a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Is'ac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of—

UNITED STATES *vs.* FRANK CARVER. } Indictment for murder. No. 126.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, May term, A. D. 1895.

UNITED STATES *vs.* FRANK CARVER. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present: That Frank Carver, a white man and not an Indian, on the 28 day of March, A. D. 1895, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms in and upon the body of one Anna Maledon, a white woman and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that the said Frank Carver, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Frank Carver, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said Anna Maledon; and that the said Frank Carver, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound her, the said Anna Maledon, in and upon the left side of the back of her, the said Anna Maledon, giving to her, the said Anna Maledon, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Frank Carver, in and upon the left side of the back of her, the said Anna Maledon, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound she, the said 2 Anna Maledon, then instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Frank Carver her, the said Anna Maledon, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 126. United States versus Frank Carver. Murder. A true bill. M. S. Gaines, foreman. Witnesses: Stephen Wheeler, Fort Smith, Ark.; Andy Crittenden, Muskogee, I. T.; F. T. McClure, Atoka, I. T.; Dr. W. W. Bailey, Fort Smith, Ark.; Dr. J. C. Amis, Fort Smith, Ark.; Miss Jennie Bailey, Fort Smith, Ark.; Lizzie Flynn, Muskogee, I. T.; Mike Flynn, Muskogee, I. T.; Dr. B. F. Fite, Muskogee, I. T.; Jno. Couch, Muskogee, I. T.; L. M. Tipton, Muskogee, I. T.; John Campbell, Muskogee, I. T.; P. A. Sanders, Muskogee, I. T.; Rube Evans, Muskogee, I. T.; Queen Looney, Muskogee, I. T.; John Grinwell, Muskogee, I. T.; Grant Huddleston, Muskogee, I. T.; Dick Brim, Muskogee, I. T. Filed in open court May 20, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

3 In the circuit court of the United States for the western district of Arkansas, Nov. term, 1895, Thursday morning, 8-1/ o'clock, Jan. 30, 1896.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs. } Indictment for murder. No. 126.
FRANK CARVER.

In obedience to the mandate of the Supreme Court of the United States, dated January 27th, 1896, it is hereby ordered by the court that the verdict of the jury in this cause returned June 29th, 1895, and the judgment and sentence of this court, July 9th, 1895, be, and the same are hereby, set aside and held for naught, and that this cause be docketed and the defendant granted a new trial.

FEB. TERM, 1896, *Saturday, Mch. 7, 1896.*

(Caption omitted.)

Ordered by the court that this cause be, and the same is hereby, continued to the May term, 1896, of this court, and set down for trial May 8th, 1896.

MAY TERM, 1896, *Friday, May 8, 1896.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, J. W. Reed, esq.; and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is ordered, upon motion of plaintiff by its attorney, that a jury come to try the issue joined.

4 Whereupon, after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit: Henry C. Bates, Leonard D. Berry, Columbus B. Carlton, Jas. B. Campbell, Albert Callison, Flem Eoff, Edmond A. Garlick, Ernest C. Hayes, Thos. Mayes; Franklin C. Maxey, Alexander Parker, Jas. M. Seward—twelve good and qualified electors of the western district of Arkansas, duly selected, empaneled, and sworn to try the issues joined and a true verdict render according to the law and the evidence; and the jury having heard a statement of the case by counsel, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

SATURDAY, *May 9, 1896.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, J. W. Reed, esq.; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Henry C. Bates, Lorenzo D. Berry, Columbus B. Carlton, Jas. B. Campbell, Albert Callison, Flem Eoff, Edmond A. Garlick, Ernest C. Hayes, Thomas Mayes, Franklin C. Maxey, Alexander Parker, Jas. M. Seward, who took their seats in the jury box, and after hearing the evidence and a portion of the argument of counsel, and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

5 MONDAY, *May 11, 1896.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, J. W. Reed, esq.; and now comes the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit: Henry C. Bates, Lorenzo D. Berry, Columbus B. Carlton, Jas. B. Campbell, Albert Callison, Flem Eoff, Edmond A. Garlick, Ernest C. Hayes, Thomas Mayes, Franklin C. Maxey, Alexander Parker, Jas. M. Seward, who took their seats in the jury box and heard the remainder of the argument of counsel and received the charge of the court, to which said charge counsel for the defendant filed exceptions.

Whereupon said jury retired, in charge of the sworn bailiff aforesaid, to consider of their verdict.

TUESDAY, *May 12, 1896.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, J. W. Reed, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: Henry C. Bates, Lorenzo D. Berry, Columbus B. Carlton, Jas. B. Campbell, Albert Callison, Flem Eoff, Edmond A. Garlick, Ernest C. Hayes, Thomas Mayes, Franklin C. Maxey, Alexander Parker, Jas. M. Seward, who returned into court the following verdict, to wit:

"We, the jury, find the defendant, Frank Carver, guilty of murder as charged in the within indictment.

(Signed) "F. C. MAXEY, *Foreman.*"

On motion of defendant's counsel the jury was polled and each juror answered for himself that the verdict as read by the court was his verdict. Whereupon the jury was discharged from the further consideration of the case, and said defendant was remanded to the custody of the marshal to await final sentence.

6 In the circuit court of the United States for the western district of Arkansas, May term, 1896, Friday morning, 8½ o'clock, June 12, 1896.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* FRANK CARVER. } Indictment for murder. No. 126.

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Frank Carver, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 12th day of May, 1896, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Frank Carver be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Frank Carver to be taken hence, and him, thee said Frank Carver, safely and securely keep from the date hereof until Thursday, the 30th day of July, A. D. 1896, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal, cause the said Frank Carver to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Thursday, the said 30th day of July, in the year of our Lord one thousand eight hundred and
7 ninety-six, cause the said Frank Carver to be hanged by the neck until he is dead. And it is further considered by the court that the United States of America do have and recover all their cost in and about this prosecution laid out and expended and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

WEDNESDAY, *July 29th, 1896.*

(Caption omitted.)

Comes defendant by his attorney, J. W. Reed, and tenders his bill of exceptions asking that the same be filed, signed, and made a part of the record in this cause, which is accordingly done.

And the said defendant having filed an affidavit setting forth that he is an indigent person and wholly unable to pay the expense of an appeal, it is hereby ordered that the clerk of this court issue the writ of error and citation, file all necessary papers, enter all necessary orders, and make the necessary transcript for the Supreme Court in this cause at the expense of the United States.

THURSDAY, *July 30th, 1896.*

(Caption omitted.)

Comes defendant and files his assignment of errors and petition for writ of error to the Supreme Court.

And now comes the clerk and makes known to the court that a writ of error taking this case to the Supreme Court of the United States has been issued.

It is therefore ordered that execution of sentence be stayed pending action of the Supreme Court.

8 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas. May term, 1896.

UNITED STATES
vs. No. . Murder.
FRANK CARVER.

Be it remembered that on the 8th day of May, 1896, in said court, the above cause came on for trial, and the United States, to maintain the issue upon its part, introduced the following witnesses in chief: Frank T. McClure, Dr. W. W. Bailey, Mrs. Lizie Flynn, J. W. Hays, Richard Brann, and Mike Flynn, whose testimony, and the exceptions taken thereto by the defendant at the time, are in the words and figures, in substance, as follows:

F. T. MCCLURE testified in that in March, 1895, he lived in Muskogee, I. T., and was a notary public and clerk in the marshal's office; that he was called to see Anna Maledon after she was shot or wounded.

Q. Do you know when it was you went to see her?

A. The first time I went to see her was the day after she was shot in the afternoon.

Q. Did she make a statement to you?

A. Yes, sir.

Q. Did you take the statement down in writing?

A. Yes, sir; I took two statements from her the first day after she was shot, and the next was the second day.

9 Q. Do you remember the date of the second one?

A. This says here [referring to statement] the 27th of March; this is the second one that was taken.

Q. That was the second statement that you took from her? (It is agreed that the shooting was March 25.)

A. Yes, sir.

Q. State if before you got that statement whether or not she said to you she was going to die.

A. Yes, sir; Dr. Fite, the physician attending her, was present at the time.

The Assistant District Attorney. We offer this statement in evidence.

Mr. J. Warren Reed (counsel for defendant). We object to the introduction of the statement, first upon the ground that there is no proper foundation laid for its introduction.

The Court. In what respect?

Mr. J. Warren Reed (counsel for defendant). I just wish to note that objection. That is all.

The Court. The Supreme Court decided upon the same state of facts that it was competent. The witness has already stated that the deceased made this statement after she said she was going to die.

The Witness. Yes; and it is incorporated in the statement, too.

The Court. The statement concludes with that. The statement itself makes it competent.

The Assistant District Attorney. Had you heard Dr. Fite advise her as to whether or not she would live or die?

A. Yes, sir.

Q. What advice did he give her?

A. He told her she could not get well.

10 Mr. J. Warren Reed (counsel for defendant). That is hearsay, I reckon?

The Court. Advice of a physician?

The Witness. It may be well enough to explain about it. The first statement I took from her the doctor had not told her positively and unequivocally that she had no chance of recovery, and the statement did not show that, and I thought at the time it would not be strictly competent, so I told him that I thought we had better take another statement and that he better impress her fully with the knowledge she could not get well. We went back the second day and he told her so, and this second statement was taken.

The Assistant District Attorney. What did she say as to whether or not she would get well or whether or not she would die?

A. I believe her language as taken in here is that from what Dr. Fite told her she knew she could not get well.

Q. She made that statement under the impression she was going to die?

A. Yes, sir.

Mr. J. Warren Reed (counsel for defendant). We object to that question as leading.

The Assistant District Attorney. He had already stated that.

The Court. He had already stated it. The question is merely recapitulative of what the witness has already stated.

The Assistant District Attorney. We offer to read the statement.

Mr. J. Warren Reed (counsel for defendant). I desire to ask the witness a question.

The Court. Yes.

Mr. J. Warren Reed (counsel for defendant). The substance of what she stated to you was embodied in this statement?

11 The Witness. Yes, sir.

The Court. Did you write it down as she give it to you?

The Witness. Yes, sir; and in her own words as near as possible. She was suffering quite a good deal, and I condensed it some to relieve her as much as I could, but the statement is substantially in her own words.

Mr. J. Warren Reed (counsel for defendant). Does the court hold this statement is admissible?

The Court. Yes, it is admissible. The witness may either look at it and give the statement orally, or he may read it. I think that is the best evidence. It is so regarded.

Mr. J. Warren Reed (counsel for defendant). I interposed my first objection to it, and the court rules that under the first objection it is admissible?

The Court. Yes.

Mr. J. Warren Reed (counsel for defendant). Now, I have a second objection.

The Court. What is it?

Mr. J. Warren Reed (counsel for defendant). We object to all the parts, or material, or contents of that statement that does not apply strictly to the act of the shooting or killing of the deceased. There is a great deal in that that is outside matter, and hearsay, and conversations, etc., and we object to all that part of it that is not confined to the act of the shooting or killing.

The Assistant District Attorney. If you point out what you object to——

The Court. Yes, that objection would not do you any good, because it does not specify what you object to. Let me read that statement.

(The statement is submitted to the court.)

12 Mr. J. Warren Reed (counsel for defendant). I could not point it out, because——

The Court (after examining statement). I do not think there is an*i*thing in there except what may be regarded as the circumstances attending the shooting, and leading up to it, and it is, therefore, competent.

Mr. J. Warren Reed (counsel for defendant). We save an exception.

The Court. The court is strengthened in this belief from the fact that this identical evidence in this shape went before the Supreme Court and the Chief Justice, in passing on the case, said it was competent, and entirely so—competent in that shape.

The Witness. The statement reads as follows:

"Annie Malledon, being duly sworn, says: My name is Annie Maledon. Frank Carver was over here Monday afternoon, and told me to meet him over by the mill that night, and if I didn't meet him that I would know that he was gone to Colorado. I went over and met him about half past eight, and he said: 'Well, Honey, you are in for it tonight,' and he said he was going to kill me before daylight, and also F. E. Walker.

"There was a man came up the track then, and he throwed his pistol down on his face and told him to leave there 'damned quick.'

"The fellow went on, and he turned and shot among a whole lot of cattle lying there. Then we both went up to Jim Dodson's and asked if he was there and Mrs. Dodson told him no. We left then and came on down towards Bill Looney's then.

"He took his pistol out two or three times and put it in my face and said he was going to kill me before morning. We went from there on down to old man Wilkins' and then we met Andy Crittenden.

13 "Andy wanted him to go with him to see some girl and I didn't want to go and I asked him to bring me on home and then he and Andy could go.

"And he said, 'I can take you home if you are that damn anxious to get there. I guess you want to lay up with Walker anyhow to-night, the son of a bitch.' I told him no I wasn't either. But he says, 'You son of a bitch, don't you tell me that, I'll blow your brains out.' He says, 'Now, you tell me that you laid up with Walker and that he sent you a pass to come down here or I'll just kill you and be done with it.'

"That's where he shot me. He shot me in the back as I went to step across to Andy.

"I looked up and it seems to me that I saw him take the pistol out of Frank's hand. I don't remember whether I did or not.

"Then Frank asked me if I was shot, and I said, 'I guess I am; it seems kind of that way.'

"Then he says: 'Annie, you won't prosecute me, will you?' I told him I guessed I would; I didn't know anybody else to prosecute. He then told Andy to take me home, that he was going to leave.

"Then Andy said I would have to wait till he could get a hack and tell somebody I was there; that he couldn't carry me. That was th' last I saw of Andy. They arrested Frank up on the track and brought him back while I was there. When the crowd came back he asked me several times if Andy didn't shoot me. This was done by the mill. I guess by what Dr. Fite says I can't get well, and this statement is intended for my dying declaration.

(Signed) "Annie Maledon.

"Sworn and subscribed before me this 27' day of March, 1895.

"F. T. McClure,
"*Notary Public.*"

14 (Endorsed on back thereof): "United States v. Frank Carver. Deposition of Annie Maledon. Filed in open court May 21, 1895. S. Wheeler, clerk."

Dr. W. W. Bailey testified in substance that he was a physician and surgeon, and lived at Fort Smith. That he knew deceased, Annie Maledon, and treated her for a gunshot wound that had entered at the right side in the spinal column and passed into the sixth dorsal vertebra, inward and upward, and lodged in the upper portion of the fourth dorsal vertebra, obliterating the spinal column, and the ball was lodged there. That this would destroy the spinal column, paralyzed her lower extremities, and caused her death. Annie Maledon was a white woman and not an Indian.

Mrs. Maggie Flynn testified in substance that in March, 1895, she lived in Muskogee, and knew Annie Maledon, and at that time the latter was staying at her house, and was there all of the day preceding the night she was shot; that the defendant, Carver, came to her house about 4 o'clock of the evening before the shooting of deceased, and defendant went away alone, and that Annie left her house about dark that evening alone; that she heard no shot that night; that deceased was brought to her house that night about eight o'clock, on a Monday night, March 25, 1895, and was shot; that she said at times she thought she would die, and then again she thought she would not; she taken sick spells; she
had Father Ketcham; she thought she was going to die there
15 one time in particular. The place the shooting is said to have
taken place was about a quarter of a mile from where I lived, on Grave Yard Hill, in the Creek Nation.

Q. At the time she said she was going to die, did she then make any statement to you about how she was hurt?

A. No, sir; I don't know as she did.

Q. Did she any time after she said she was going to die, after she reached the conclusion she was going to die, tell you how she was hurt?

A. No, sir. She had told me different times how she was hurt, but she didn't at the time she was sick; them spells she had; she had sinking spells.

Q. Were you present at the statement made to Mr. McClure when Dr. Fite was present, the statement made there?

A. I heard part of it. I don't know whether I heard it all or not.

Q. You were a witness at the former trial, were you not?

A. Yes, sir.

Q. Did you state there that she——

Mr. J. Warren Reed (counsel for defendant). We object; that is leading. Let him ask the witness what she did state.

The Assistant District Attorney. Did you make any statement there with reference to her telling you how it occurred after she had reached the conclusion she was going to die, that she could not get well?

A. I don't think——

Q. I am doing that to refresh your memory, to see, after she concluded she was going to die, whether or not she made a statement to you or told you how it happened or it occurred. Can you say she made a statement
before she reached the conclusion she was going to die?

16 A. Yes, sir.

Q. Now, the question is whether she made the same statement or another statement after she concluded she was going to die?

A. No, sir; not to my recollection; she didn't.

Q. How many statements did she make to you in regard to the matter?

A. I had heard her talk several times; I couldn't tell you.

Witness stated that she knew deceased's clothing offered in evidence was hers and worn by her at the time she was shot, and she took them off after she was brought to her house wounded. The clothing was powder burned.

Q. State whether or not Annie Maledon called for a Cath*lois* priest?

A. Yes, sir.

Mr. J. Warren Reed (counsel for defendant). We object to that; that is not competent.

The Court. That is competent.

Mr. J. Warren Reed (counsel for defendant). We except.

The District Attorney. Can you tell the object of her calling for him?

Mr. J. Warren Reed (counsel for defendant). We object to that.

The Assistant District Attorney. I submit it to the court.

The Court. Are you a Catholic?

The Witness. My husband is.

The Court. Do you know whether they performed what they call the last rites of the church there for the dying? Did the priest do that?

The Witness. I think he did; yes, sir.

The Court. Was that what she called for him for?

The Witness. Yes, sir; I think so. I do not understand the Catholics very much.

17 Mr. J. Warren Reed (counsel for defendant). We except to that testimony.

The Witness. She took the sacrament at our house.

The Court. That is entirely competent. The books lay it down expressly as evidence of an apprehension of death. (To the witness): She took the sacrament, did she?

The Witness. Yes, sir.

The Assistant District Attorney. Your husband was present, was he? He knew of her taking the sacrament there?

The Witness. Yes, sir.

Mr. J. Warren Reed (counsel for defendant). I ask that the gentleman not lead his witness.

The Assistant District Attorney. Do you know whether your husband knew anything about her taking the last rites of the church there at your house?

A. I think he did.

Q. Now, after that did she make any statement to you with reference to how this matter occurred?

A. No, sir; I don't remember of her doing it.

Cross-examination:

Witness states deceased stayed eleven days at her house after she was brought there wounded, and was then taken to the Catholic church about one-quarter of a mile away, where they took care of sick people, and kept there until she was brought to Ft. Smith, Arkansas, later, and that she went to see her twice while at the Catholic church soon after she was taken there.

18 By Miss Jennie Bailey Government proved that Annie Maledon, the deceased, died at St. John's Hospital, in Fort Smith, Ark., on the day of , 1895, and that she was brought to Fort Smith the day of , 1895.

J. W. Hays testified in substance that he lived in Muskogee March, 1895, and that on the evening of the night of the shooting, about an hour before it occurred, but after dark, he saw defendant and Annie Maledon together, in Muskogee, by the mill crossing, walking up, crossed the railroad; that defendant had hold of her, and talking with Andy Crittenden—fussing with him—and they walked on up and came across the railroad and was shaking her by the arm, telling her that he had her now and that, God damn her, he would kill her before morning; that he heard the shot an hour later; that defendant had a .44 or .45 pistol in his hand as he went along, shooting at random; that he was about 150 yards away when he heard the shot and the woman scream, and ran to her as soon as he could; that she said, "I am killed," and told me to take her home; that she wanted to see her baby; that I told her she was shot and I did not like to have anything to do with it unless she told me who shot her; that she could not stand up, and told me to take her corset off, and I did so and found the shot in her back. I told her I thought she would get all right, that she was exerted. The defendant was there; Mr. Brann had him there in charge. I struck a match to see the wound on the woman, and saw it was Carver there; and the woman was crying and going on, and the defendant asked her who shot her.

The declarations of Annie Maledon at the place of the shooting was objected to by defendant's attorney, but were admitted by the
19 court on the grounds that they were part of the res gestæ, and defendant's attorney saves an exception.

Richard Brann testified in substance that he lived in Muskogee, and was watchman at the mill night of the shooting, and up to the time the woman was shot had heard some 5 or 6 shots down that way, and a short time before the woman was shot had seen a man and woman 30 steps away talking low to each other, going that way, but could not say what they said or who they were, it was dark; and a few minutes later heard another shot fire and a woman scream, and I started to the place and met defendant coming running away, and he went back toward the woman and then came again, and I caught him and took him back to the woman again, about 30 yards, where she was hollowing and crying, and Mr. Hays was there with her, and Frank said to her, "Anna, who shot you?" or "Honey, who shot you?" or something that way, and Anna says, "Oh, you know who shot me." Frank wanted to go to het to help her, but I would not let him, and soon after I took him to jail. He made no statement to me about it. Defendant was drunk, or was drinking; he h'd no pistol that I saw.

Mike Flynn testified in substance as follows: That he lived in Muskogee, Ind. Ter., in March, 1895, and that he knew the defendant, Frank Carver, and Annie Maledon; that he saw her on the evening of the day she was shot, and saw her after she was shot.

Q. State whether you went after Father Ketcham for her.

A. Yes, sir; I did.

Q. Mr. J. Warren Reed (counsel for defendant). We object
20 to that.

The Assistant District Attorney. State whether or not he came?

A. Yes, sir.

Q. Who was Father Ketcham?

A. He is the priest there at Muskogee.

Q. Catholic priest?

A. Yes, sir.

Q. For what purpose did he come to her?

A. Well, she was a Catholic, and knowing she was a Catholic I asked her if she wanted Father Ketcham, and she said she did.

Q. Were you present when he was there?

A. Yes, sir.

Q. Did he administer the sacrament to her?

A. Well, that was two or three days afterwards; he was there three times.

Q. Did he administer the sacrament to her?

A. Yes, sir.

Q. Now, state after that whether or not she made a statement as to how she was shot?

A. Yes, sir; she told how she was shot.

Q. At the time she told, state whether or not she believed she was going to die?

A. Yes, sir.

Q. Now tell us what she said as to how she was shot?

A. Well, she said that her and Frank——

Mr. J. Warren Reed (counsel for defendant). The testimony heretofore introduced shows, and he just heard the statement the woman made to Mr. McClure.

21 The Assistant District Attorney. She made other statements to this witness or in his presence.

The Court. The Government would have a right to prove it by him also.

Mr. J. Warren Reed (counsel for defendant). It is only cumulative.

The Court. They may offer it, although it may be cumulative.

Mr. J. Warren Reed (counsel for defendant). Unless they want to vary her statement offered here. Do you want to vary it?

The Witness. I will commence, then, at the first start. The evening she was shot she holloed all the way up through the lane——

Mr. J. Warren Reed (counsel for defendant). We except to that.

The Assistant District Attorney. The only thing I want you to state is as to what she said as to how she was hurt—how she was shot.

Mr. J. Warren Reed (counsel for defendant). That the court may understand us, it appears from the testimony introduced by the Government this morning that this man was present at the time that Mr. McClure took this written statement.

The Assistant District Attorney. We simply offer it, and if objection is made to it we do not object to the testimony stopping at that point.

The Court. I think you have a right to inquire particularly as to—let me ask the witness a question or two. You say you are a Catholic?

The Witness. Yes, sir.

The Court. A member of the Catholic Church?

The Witness. Yes, sir.

The Court. People who believe in that religion have administered to them what they call the last rites of the church?

The Witness. Yes, sir.

22 The COURT. Did the priest perform those last rites of the church to this girl?

The WITNESS. Yes, sir.

The COURT. When is that administered?

The WITNESS. When they think they are going to die.

The COURT. When the party to whom it is administered believes they are going to die?

The WITNESS. Yes, sir.

The COURT. That goes to strengthen the apprehension of death?

The ASSISTANT DISTRICT ATTORNEY. To that extent we want it to go.

The COURT. You do not ask for anything further?

The ASSISTANT DISTRICT ATTORNEY. No, sir.

Mr. J. WARREN REED (counsel for defendant). We except to that.

The ASSISTANT DISTRICT ATTORNEY. On the ground they object——

Mr. J. WARREN REED (counsel for defendant). I just simply except to it.

The COURT. You can't except to it if they do not offer it, except this part that has gone in; you except to that?

Mr. J. WARREN REED (counsel for defendant). I except to this part that has gone in, with the argument of the gentleman on the other side that it strengthens it and all that sort of thing. That is a sort of a conclusion. I supposed when he offered the written statement of Mr. McClure——

The COURT. It is perfectly competent to offer that. One case is cited by Mr. Wharton, in his work on criminal evidence, where that may be proven with regard to people who belong to that church, as an evidence that they were under the apprehension of death. That is all it is offered for, I understand.

23 Mr. J. WARREN REED (counsel for defendant). On that principle that might do, if he felt Mr. McClure was not a credible witness and did not tell the truth about what the woman said, and so on.

The COURT. Nobody questions that, I reckon, but the Government or the prosecutor has a right to choose how much evidence they will offer that is cumulative.

24 Be it further remembered, that after the United States had rested its case in chief, the defendant, to maintain the issue on his part, introduced and examined the following witnesses: John Wilky, Mary Belstead, Wm. Herring, Thomas Wilson, Lizie Carver, Frank T. McClure (recalled), Katie Belstead, Matilda Wilky, James Lee, Mary Murray, Henry Looney, John Alexander, Dr. W. W. Bailey (recalled), Mrs. Emma Murray, Queen Looney, Julia Hersha, Tucksy Miller, Buck Rogers, Clarence Owensby, Lizie Flinn (recalled), Dan Russel, John Doyle, Dan Riddle, Frank Carver, deft., whose testimony, and the exceptions thereto taken by the defendant at the time, are in words and figures in substance as follows:

JOHN WILKEY testified in substance that he had lived in Muskogee for 24 years; had known defendant 16 years past, at Muskogee mostly; is no relation to defendant; knew Annie Maledon ever since defendant and her been going together, which is now about four years. Defendant has been married to another woman at Muskogee about 2 years ago and

had 2 children, and he and his wife were parted, and he took up with Anna Maledon; that to all appearances they loved each other most devotedly, and were very intimate; that about a year after deft. and Anna took up together they went to La Junta, Colorado, and lived together and passed for man and wife about seven months, he working at $30 per month on a stock ranch and she keeping about 12 boarders of the stockmen. Their conduct was good, and they seemed to be very loving and affectionate. I worked on the same ranch and boarded with them at La Junta, Colorado, on J. D. Forwarthy's ranch. About a year later they came back to Muskogee, and I had came back home to
Muskogee, which was about two or three months before Anna
25 was shot. Defendant for many years, ever since I knew him,
has been a habitual drunkard—a hard drinker—and when he returned with Anna to Muskogee was drunk most of the time. He drank whiskey, jamaica ginger, and hard cider mixed, and all sorts of bitters. He would drink anything to get drunk, as whiskey is not so easy to get there as it is here. Defendant for several days just preceeding the shooting of Anna Maledon had been on a big drunk, and drinking everything that he could get, and that was mostly jamaica ginger and hard cider. My father, Duncan Wilky, kept a confectionery in Muskogee, and sold hard cider, and defendant was about there drinking for several days, and on the day preceeding the shooting was about there drinking cider and jamaica ginger mixed, and was very drunk. That kind of a mixed drink has a bad effect on a man from my experience; it makes a man dazed and crazy. Deft. had tried to help me work in the garden some after dinner at Duncan Wilky's, but got to' drunk and quit, and said he would go and see Annie and get some money. This was about four o'clock in the evening, and he came back about 5 o'clock and had four common-sized bottles jamaica ginger, and went to drinking more ginger and cider mixed, and left then about dark and went home, and I left him very drunk—crazy drunk—and drinking that ginger and cider, and Anna Maledon was there with him at my father's confectionery, and I saw no more of them that night. I never heard defendant make a threat of any kind against Anna in my life; nor upon that day, of Monday, March 25, 1895, did he say a word against her in any way that I heard. They were as kind and affectionate toward each other when I left as I had ever seen them before. I never heard defendant mention the name of Walker or say anything of him. It had been defendant's habit to carry a pistol ever since I knew him.

26 MARY BELSTEAD testified in substance that she lived in Muskogee, and on the night Anna Maledon was shot was with a sick woman a short distance across the track from the place of the shooting; that she and the witness, Miss Mary Murray, were out getting water, when they heard a woman begin to scream, and she and Miss Murray and her sister-in-law ran toward the place where the woman was holloeing—within about 50 yards of the woman screaming—as quickly as they could get there, and when we got there we heard the defendant's voice crying and saying, "Oh, Anna, who shot you?" We had first heard the woman begin to scream. I don't remember if I heard the pistol shot; I may have heard it, but not paid attention; the screaming first attracted our attention, and we ran toward the place quick as we could, and heard the defendant there

with her talking. We could not see if there was any other persons there with the woman or not; afterwards we heard some talking there; we did not go to the place where the woman was.

The testimony of this witness was objected to by the district attorney and excluded by the court, on the grounds that the declarations of the defendant could not be admitted as evidence in his favor unless part ot the res gestæ, and the court held them not a part of the res gestæ here. To which ruling of the court defendant, by counsel, excepted.

Miss Mary Murray was called, and was offered as a witness to prove that she was present with Miss Belstead and heard substantially the same conversation and declarations by the defendant at the place of the shooting as herein stated by Miss Bealstead.

Which, being objected to by the district attorney, was also
27 excluded by the court, and to which ruling of the court defendant,
by counsel, excepted.

William Herring testified in substance that he lived at Muskogee, Ind. Ter., and at the time that Anna Maledon was killed was a guard at the U. S. court jail when defendant was brought to the jail by Richard Brann the night Anna was shot. Had been a guard there two years but had never seen the defendant before that night.

When Dick Brann brought the defendant to the jail I received him in the jail, and he was staggering, falling around, crazy drunk. Defendant acted like a crazy, drunk man to me; he looked and acted that way. Defendant insisted on knowing by what authority I put him in jail when I searched him and put him in, but I did not tell him. After a few minutes defendant layed down and lay there when I went off duty next morning, in a stupor like a man asleep, and when I returned on duty next evening, 6.30 p. m., he was the same way.

Thomas Wilson testified in substance that he lived in Muskogee the past three years and worked for the court about the same time as guard at jail and deputy marshal. That he knows defendant when he sees him is all. I was working at the jail at Muskogee when Anna Maledon was shot, and defendant was brought to the jail that night crazy drunk. Well, defendant was drunk, or crazy, or something the matter with him; he didn't have his right mind, or didn't appear like he did. From the way he acted it did not appear to me that he knew what he was doing. In my judgment he did not know what he was doing. We put him in a
cell in the jail and he laid there all night like a crazy man or
28 a man that did not know where he was. I went over to Mike
Flynn's, where the woman that was shot was taken to about 10 o'clock that night; I went over there to see her, and did not see her, there was so many there that I didn't have time to wait till they got away, and I went back and come next morning, 3 or 4 o'clock, to see her. On Wednesday morning after she was shot Monday, March 25, 1895, she made a statement to me as to the facts and circumstances of the shooting.

(At this point defendant offered to prove by this witness that Anna Maledon had told him the second morning after she was shot, at Mike Flynn's, that defendant did not shoot her intentionally, that the shooting was accidental and not done by defendant a purpose, that defendant was so drunk he did not know what he done, and did not shoot her a purpose. To which the district attorney objected, and the court excluded the proposed evidence, and the defendant, by counsel, excepted.)

JOHN DOYLE testified in substance that he was a guard at the U. S. jail at Muskogee three years past, was there on guard when defendant was brought to and put in jail the night Annie Maledon was shot. That witness knew defendant well for six years, and had worked with him, and knew him to drink a great deal, was a habitual drunkard, and get drunk, but had never seen defendant so drunk in his life as when brought to the jail the night Anna Maledon was shot.

Lizie Carver, Matilda Wilky, Henry Looney, John Alexander, Queen Looney, Dan Russel, were all examined as witness' on part of the defendant, whose testimony tended to show that they all lived in the town of Muskogee, Ind. Ter., that they knew defendant for several 29 years, and knew him to be a habitual drunkard for many years back. That he would drink anything to produce intoxication. That they all saw defendant on the evening preceeding the shooting of Anna Maledon. That defendant on said evening, and up till after dark, was in a beastly state of intoxication and was crazy drunk, or, as some of them use the term, was crazy from drunkenness, and did not seem to know what he was doing. In the evening late, Lizie Carver saw him after dark, and though she had known defendant about 14 years, and he her brother-in-law, he stumbled over her at a house of a Mr. Allen, across the street from Duncan Wilky's confectionery, early in the night, just after dark, and defendant did not know her.

The testimony of Mrs. Queen Looney more especially tended to show that just after dark the evening of the shooting, defendant and Anna Maledon came to her house on their way to Duncan Wilky's confectionery, and deft. was very drunk, and had his pistol out, flourishing is around, and Anna made him sit down in a chair and took off his hat and brushed back his hair and kissed him and set on his lap, and witness said he seemed crazy from drink, and that there was not an unkind word between them, but they seemed all love and affection toward each other; that they went off together in direction of Duncan Wilkey's, and that about a half hour or such a matter they came back to her house and came to the front door, but she, knowing defendant's drunken, crazy condition, would not go in the front room where they were, but sent her husband, and they remained but a moment and went on, and but a short time afterward heard of the shooting of Anna Maledon.

Matilda Wilkey was offered by the defendant to prove that she had gone to see Anna Maledon the next morning after she was shot, 30 and that Anna made a statement to her in regard to the shooting, in which Anna said that defendant did not shoot her a purpose; that he shot her accidentally; that he loved her too well, and she him too well, and that he would not have shot her intentionally; that defendant was drunk—so drunk he did not know what he was doing.

This testimony, being objected to by the district attorney, was excluded by the court on the ground that it was not shown at the time Anna Maledon made these statements that she made them under the belief of impending dissolution and that she was going to die, to which ruling of the court the defendant, by counsel, excepted.

CLARENCE OWENSBY testified, in substance, as follows: That he has lived in the city of Fort Smith the past twelve years and knew Anna Maledon in Fort Smith, where she was raised, about 5 years before she went to Muskogee, Ind. Ter.; that he saw Anna Maledon at the Little Rock depot, in Fort Smith, Ark., after she was brought in on the train from Muskogee, wounded, and she was left there in the waiting room, and no one with her but a little girl and a strange man; that she sent the man around to tell me to come in. I walked in and asked what she wanted, and she asked me if I knew her. I did not recognize her at first, she was so poor. She wanted me to go on to Mrs. Doyle's (her sister) and get some one to take her to her house.

At this point defendant offered to prove by this witness a statement made to witness by Anna Maledon as to the facts and circumstances of how she had been shot by defendant tending to show that the shooting was accidental and that defendant did not shoot her intentionally, to which the district attorney objected, and the court excluded the evidence for the reason that it was not shown at the same time that
31 at the time Anna Maledon made the statement offered to be proven that she expected to die, to which ruling of the court the defendant, by counsel, objected.

Katie Belstead, Emma Murray, Julia Hershey, and Daisy Weddell were all examined on the part of the defendant, whose testimony tended to show that the deceased, Annie Maledon, had made statements to them and in their hearing after she was shot and while she was at Muskogee and before she was brought to Fort Smith, Ark., to St. John's Hospital to the effect that defendant was drunk when she was shot; that defendant did not shoot her a purpose; that he shot her accidentally; that he loved her too well and would not have shot her intentionally. And specially by Julia Hershey it tended to show that she had known Anna Maledon since she was a child in Fort Smith, Ark.; that Julia was the nurse of Anna after she was taken to the Catholic church at Muskogee, eleven days after she was shot; that Anna told her over and over that she was going to die from the wound she had received; that Anna said she was praying; that Anna told her several times while Julia was nursing her that Frank had shot her, but he did not do it intentionally; that he loved her too well and she loved him too well to shoot her that way if he had been sober, and that she said to Julia, "We loved each other too well for him to shoot me a purpose;" that Julia helped take her to the train when she was brought from the Catholic church at Muskogee, Ind. Ter., to Fort Smith, Ark., and that Anna told her the last time when she dressed her to go to Fort Smith that Frank did not shoot her a purpose; that Frank would not have shot her for nothing on earth. She talked more to me than anyone else.

32 TUCKSY MILLER, BUCK ROGERS, testified on part of the defendant, and whose testimony tended to show that they lived in Muskogee many years and knew the defendant well and knew Anna Maledon. That on the night she was shot they saw defendant and her together early in the evening, perhaps an hour before the shooting, near a railroad crossing. That defendant was very drunk and holding to Anna, and had his pistol out, flourishing it around and shooting at random, and Anna was

trying to get him to put up his pistol and go along home and behave himself. That there was no threats of any kind made by defendant against Anna, that they heard, but that defendant seemed to be crazy drunk, shooting at random, and Anna was trying to get him to put up his pistol and go along with her, and he was holding to her with one hand. That Miller passed on in one direction and Rogers in another, and Rogers returned the same way some half hour or more later, and saw that Andy Crittenden was then in company with defendant and Anna, and that defendant was still boisterous and crazy drunk and shooting his pistol at random, and that Crittenden was trying to get deft. to put up his pistol and go along, and that Anna still had hold of defendant as if holding him up and telling him to come along and put up the pistol. When Rogers being away from them some forty steps the defendant's pistol fired again and the woman hol'owed, and Crittenden said, "Never mind," or something like that, the witness could not understand. That before the shooting Rogers heard no threats by defendant of any kind against the woman Anna, but they seemed to be all friendly together when the pistol fired, and Crittenden was there with them. That witness went on his way, not wanting to be mixed up in the trouble.

33 Dr. W. W. Baily, being recalled by defendant, testified, in substance, that he had been a physician since 1866; that he is familiar with the component parts of Jamaica ginger; that the ordinary Jamaica ginger bottle holds four ounces, or quarter of a pint; that a fair article of Jamaica ginger is one-half alcohol and half water, which contains the other ingredients; the best alcohol is used in Jamaica ginger and goes from one-half to 65 per cent alcohol. Hard cider and Jamaica ginger mixed makes a dangerous drink and hard on the stomach. Any mixed drinks produce intoxication sooner than straight drinks.

Mrs. Lizzie Flynn, being recalled by the defendant, testified as follows:

Q. Something was said here when you were a witness upon the stand about a man named Walker being at your house. I don't remember what it was. When did he come to your house? With reference now to the shooting of Annie Maledon, when did he come there?

The Witness. He came the next morning.

Q. How long did he remain?

A. He stayed while she did.

Q. While she was at your house?

A. Yes, sir.

Q. Then he left?

A. Yes, sir.

Redirect examination by the Assistant District Attorney:

Q. He was a friend of Annie Maledon's?

34 A. Yes, sir.

Mr. J. Warren Reed (counsel for defendant). That is objectionable. I just merely wanted that fact.

The Assistant District Attorney. Why did he stay there?

Mr. J. Warren Reed (counsel for defendant). I don't know. I didn't ask that. I just wanted that simple fact.

The Court. That is a competent in the case.

The ASSISTANT DISTRICT ATTORNEY. Do you know whether Annie Maledon received a telegram from Walker on the day before?

Mr. J. WARREN REED (counsel for defendant). I object. I don't care if she received a barrel of them.

The COURT. It is competent to show her relation with Walker for the purpose of showing this killing——

Mr. J. WARREN REED (counsel for defendant). The telegram is the best testimony. Produce it. If you have got the telegram, produce it.

The ASSISTANT DISTRICT ATTORNEY. We haven't got it.

J. WARREN REED (counsel for defendant). Neither have I.

The COURT. She can state whether she knows she received it or not. She can't state the contents of it.

Mr. J. WARREN REED (counsel for defendant). I object to that.

The COURT. Of course you do. (To the witness): Do you know whether she received a telegram?

The WITNESS. She didn't, to my knowing.

The ASSISTANT DISTRICT ATTORNEY. Do you know how long she and Walker had been friends?

The WITNESS. No, sir.

Mr. J. WARREN REED (counsel for defendant). We object to that.

35 The COURT. That is all right, but it is competent.

Mr. J. WARREN REED (counsel for defendant). We object to that.

The COURT. That is all right, but it is competent.

Mr. J. WARREN REED (counsel for defendant). We save an exception to that.

The COURT. Yes.

36 FRANK CARVER, the defendant, being duly sworn in his own behalf, was examined in chief by J. Warren Reed, esq., and testified as follows, to wit:

Question. Your name is Frank Carver?

Answer. Yes, sir.

Q. You have been ailing. What is the matter with you?

A. I don't know, sir, what has been the matter with me. I don't think the doctor knows. I have been sick about seven months, or eight months, off and on.

Q. It seems to affect your mouth; what is that?

A. I don't know what it is. It is fever blisters, I recon. I can't talk. It is on the inside of my mouth. I think I am salivated.

Q. How old are you, Frank?

A. I am 26 now.

Q. Have you been married?

A. Yes, sir; I have been married.

Q. When were you married? How long were you married?

A. I have been married now, I guess, eight years, or eight and a half, to the best I remember.

Q. What was your wife's name before you married her?

A. Her name was Murray.

Q. Did you part with your wife?

A. Yes, sir; I quit her, or she quit me; it has been about four years and a half now. I have been in jail down here over a year. About four years and a half when I was tried before, but about five years and
a half now.
37 Q. She quit you?
A. Yes, sir; she went to her mother's.

Q. You parted, in other words?

A. Yes, sir. We have been quit now about four years and a half.

Q. When did you first meet up with Annie Maledon? When did you first make her acquaintance?

A. I guess it has been—it was about four years.

Q. Where did you first meet her?

A. Here at Fort Smith. May be a little longer than four years now. I don't remember. I met her in Fort Smith the first time I ever met her.

Q. When you formed her acquaintance?

A. Yes, sir.

Q. What happened between you and her as to whether or not you agreed to be lovers and live together after that?

A. I had quit my wife about six or eight months before I got acquainted with her, and when I come here as a witness I got acquainted with her, and I took her home with me.

Q. Where to?

A. Muskogee. I kept her there about a year, and then I left there and went to Colorado, and I took her with me.

Q. How did you and her live after that?

A. We just lived together. I kept her and took care of her, and give her money all the time.

Q. Did you live as man and wife?

A. Yes, sir. We didn't there at Muskogee. I had to kind of keep away from her there, but I did when I went away from there.

Q. What was going to happen between you and her, if anything?

A. We were aiming to get married several times. I came back there
several times to get a divorce.
38 Q. Did you get a divorce?
A. No, sir; I didn't get it. I couldn't get it on account of this
wife of mine. She said she would give me a divorce provided I didn't marry Annie. She didn't want to live with me any more, but she didn't want to please Annie that much. If I didn't marry her she would give me a divorce. I wouldn't promise her, and I thought I would sue her for a divorce, but I wanted to get it without suing her if I could. I didn't want to have her pay the cost, and I didn't want to have to pay it.

Q. You say you went to Colorado with Annie?

A. Yes, sir.

Q. Go on and tell when you left there. State it in your own way, as short as you can.

A. I took her out to Colorado and kept her about two years and a half, maybe going on three years, and I made a pretty good stake out there, and thought I would go back and get a divorce, and if necessary we had better get married, for there might be something done with us. So we come back to Fort Smith. I was to leave her here and go back up there and get a divorce. So I didn't go back up there. We went from here to Texas then. I come back again, and then went back to Texas and staid all winter. And then we come from Texas back up there in the spring, and I was waiting for some money that was coming to me from Colorado, and I was going to sue for a divorce, and then we were going to get married.

Q. What did you do in Colorado?

A. I worked on a ranch a good deal, and I worked in several saloons there.

Q. What did she do?

39 A. When I was on the ranch she done the cooking. We kept house all the time.

Q. You boarded the ranch hands?

A. Yes, sir; she boarded them. She made that money, and I worked by the month. We just lived there as man and wife, and she done the cooking. We raised a lot of stuff there, made a pretty good pile of money there, and I went to Denver.

Q. What did you have when you came away from there?

A. I had about $1,800 when we got here to her sister's.

Q. Go on, then, from that on down, as briefly as you can.

A. That is about all. We went from here to Texas and lived that winter, and then came back in the spring up there, and I had some more money coming to me, and I was just waiting for that when I got into this trouble. I was laying around there drunk.

Q. How long had you been about Muskogee when this occurred?

A. We had been there about a week or two. I came up there first, and then I sent on back for her, and she came on up.

Q. Now, tell us how long have you drank whiskey?

A. I have drank whiskey ever since I can remember. The man that raised me always kept whiskey, and I have drank whiskey ever since I have been big enough.

Q. Are you a drunkard, or not?

A. I will drink whiskey every time I can get it. I just got in the habit of it; just kept running on and running on and drinking, and just drinking anything I could get, and I got used to drinking anything of the kind; just drink anything I can get, when I was outside. That is all the drawback I had, was whiskey.

Q. How does it serve you after you have been on a drunk?

40 A. When I get on a drunk and stay drunk a month or two, it just works along in my head here. I don't hardly get down very much then. The first two or three days I might get down right along, but after I have been on a drunk a month or two it works in my head along in here, right across my head here.

Q. Do you know then what you are doing?

A. No, sir; not when I get drunk. When I start in to get drunk I don't aim to stop until I get drunk.

Q. In this case you are charged with shooting this girl. Get up to that as soon as you can. When did you go to Muskogee?

A. I wouldn't say for sure. I didn't know before—I could have told before, but since I have been down here I have forgot a whole lot. A fellow will forget a whole lot when people put him down there and nobody do anything for him; throw a little quinine into him once in a while. I came from Greenville, Texas, and left her there, on the 16th or 17th of

March, I don't know for sure, and she came right on, and I came to Denison and then sent her money back there from my aunt's. I have got an aunt there. I have got money from her several times, in Texas, after I went broke. I sent her money from Denison to Greenville, and I just came right straight on up there and she came on in a night or two, I think the 17th or 18th of March.

Q. Did you love that woman?

A. Yes, sir; I loved Annie better than anybody living, or if I didn't I wouldn't have staid with her like I did.

Q. Did she love you?

A. She said she did, and she always stood by me in everything.

Q. Was there ever any trouble between you and her in any way?

A. No, sir; we never had no trouble; never did.

41 Q. At no time?

A. No, sir; never fell out.

Q. Did you ever have any cross words or anything?

A. We might have had a little words once in a while. I don't think anybody ever lived together that didn't have a word or two. I might have done something she didn't like, or something like that. I wouldn't quarrel with her and she wouldn't quarrel with me.

Q. Now, coming up to this time when you come to Muskogee, when this occurrence happened. When did you get there?

A. I got there about the 17th or 18th of March, I think it was, and she came right on the next day or two after that; come about the 20th.

Q. What did you do, now?

A. I was drunk when I got there. I had whiskey.

Q. Where did you get whiskey?

A. I brought it with me from Denison, Texas. She came on up there and she got after me for being drunk, and I waited a day or two, and I thought I would go to Colorado, and my money didn't come, and I went to Osweego and I got some whiskey there, and I got drunk there, and I came back. I went up there on Thursday night, I think it was, or Friday morning anyway, and came back on Saturday morning.

Q. Right there, Frank: How did you make your money? What did you do?

A. I was gambling pretty near all the time. Sometimes when I got hard up I would strike a good job of work. I wouldn't work for a dollar or a dollar and a quarter, for I couldn't make a living at it. We lived too high.

Q. Did you make money gambling?

A. Yes, sir; I made money all the time.

42 Q. Are you a good gambler?

A. Yes, sir; I never ask anybody any odds when I am well and have got a few dollars.

Q. That is how you made that amount of money?

A. Yes, sir.

Q. Now, go on from that. You say you come there and had this whiskey?

A. I come from Texas, and I run out of whiskey, and thought I had better leave, and I give her what money I had, or the most of it, and I went to Osweego, and I just had a few dollars. I had ten, or twelve, or fourteen dollars, something like that; I don't know just what I had. I was drunk all the time, and waiting there for trains. Just got drunk right there at the depot, and then I got some whiskey and just came on back the other way, and I came back on Thursday or Friday, maybe Saturday—I think it was Friday, for I was drunk when I came back—and when I give away what whiskey I had and drank it up I commenced on jamaica ginger. This boy that was here got a great deal of ginger for me, because they wouldn't sell it to me. They wouldn't sell me anything. They wouldn't sell me lemon extract.

Q. This yellow boy would get drinks for you?

A. Yes, sir; that is what I said here before. I don't know just what I said before.

Q. You were drunk, now, you say, from this Thursday to Friday or Saturday. Is that correct?

A. Yes, sir.

Q. And Sunday what were you doing—Sunday preceeding this Monday when she was shot?

A. I was drunk all along those days.

43 Q. Drunk all the time?

A. Yes, sir.

Q. What were you doing on Monday?

A. I was fooling around there with Jack Wilkey, I remember, some on Monday, and several of the boys and Yellow went and got me jamaica ginger, I think, once or twice; I don't know how many times. I was drinking that hard cider. That would make you drunk. Crab-apple cider—hard cider.

Q. Where did you get that cider?

A. At old man Wilkey's. He would get drunk, and we could get all we wanted.

Q. You would get crab-apple cider there?

A. Yes, sir.

Q. What would you put in it, if anything?

A. I would drink that ginger. I wouldn't hardly ever give anybody any of the ginger. I would buy them cider and give them cider, but not the ginger.

Q. Who all got ginger for you that day?

A. Annie got four bottles that evening—sometime in the evening—brought the four bottles.

Q. During the day where were you and what were you doing; that is, on Monday preceeding the night she was shot?

A. I don't know what I did do on that day. I was just around there drinking—running about from one place to another. I went up where she was that evening, I remember.

Q. Did you see her that day or that afternoon?

A. Yes; I saw her that evening sometime.

Q. Where did you see her, and what arrangements did you make with her?

44 A. I went to Flynn's that evening, I think it was, and I sent her up town to get some ginger. I knew they would sell it to her, but they wouldn't sell it to me. I just had two dollars and a quarter, and I give it to her, and she went up and got some ginger and smoking tobacco, and brought it back. I asked her was she going over with me. She told me to go on, she would be over about dark; it was too

light yet; for me to go ahead and she would come on over. And I went over there to old man Wilkey's, and I got drunk. I just went to drinking just as quick as I got there and got the cider, and it seems like she come there. I don't remember when she come; I don't remember when we left.

Q. Did she bring you the jamaica ginger?

A. She brought me the ginger, and I went on over there and she went back to Flynn's.

Q. How much ginger did she bring you?

A. She brought me four bottles.

Q. What time did she bring you those four bottles?

A. I guess—the sun was up yet; it wasn't sundown. I don't know just what time it was. A fellow drunk that way won't pay much attention.

Q. How many bottles did you get that Monday of ginger?

A. I got three or four. I had one when I got up. When I drank that I drank three or four more. This here yellow boy got it.

Q. Did you drink them all during that day?

A. Yes, sir; I give away about a bottle or a little more, but I didn't give away much of it, because it cost too much, and I was too near drunk. That is the reason I didn't give it away. I would give them cider, but I wouldn't give them my ginger.

45 Q. Do you know this man John Alexander—this man who told us here on the stand about your being at Duncan Wilkey's late that evening and having a pistol? Do you remember about that?

A. No; I don't remember of seeing him.

Q. Were you there about Duncan Wilkey's?

A. I guess I was. I would lay around there all the time. I don't know; I guess I was there. They said I was there.

Q. Did you have a pistol?

A. I had one all the time. I didn't have none when I come back. I sold my pistol in Texas.

Q. What has been your habit about carrying a pistol?

A. I have always carried one when I was *ip* there in the Nation, ever since I was big enough to carry them. I remember when I was just a kid I used to carry them, and skin my hips with them—these old bull dogs.

Q. Do you know what you were doing with a pistol there that evening, like this man Alexander says? Do you remember about that?

A. No, sir; I don't remember about that.

Q. Tell us all you do remember about meeting Annie that evening, and where you went with her, and what you done.

A. It seems like I met her there. Our intention was, I know, for us to go down to this old lady's—old Aunt Julia's. I don't know whether we went there or not; I don't remember.

Q. Had you been in the habit of going there?

A. We went there all the time. We used to go there and stay all night pretty near all the time. I wouldn't stay about Flynn's. I did not like him. He was trying to get me arrested all the time.

Q. This man Mike Flynn?

A. Yes, sir.

46 Q. Then what? Tell us what you know about coming down. You heard what these witnesses say, that you were seen along on the streets that night with that woman, and that you were having this pistol out, and shooting it off. You have heard all they said. What do you know about that?

A. I don't know much about it. I know I was drunk. I remember of waking up in jail next morning. I didn't know where I was. I didn't know how I came there.

Q. Did you shoot that woman intentionally?

A. No, sir; I would not have shot her for anything in the world. I wouldn't shoot anybody a purpose, and I wouldn't have shot her for nothing—for the whole world.

Q. You would not have shot her for anything in the world?

A. No, sir; anybody that ever knew us would know I didn't shoot her a purpose. Her folks all knew it.

Q. You heard what the prosecuting attorney stated here, about there being a man named Walker between you and her. Did you know anything about Walker?

A. I never heard of him until I come here on this trial. I never heard of such a man. I didn't know there was such a man in the country.

Q. You never heard of him?

A. No, sir.

Q. If she ever had any sweetheart by the name of Walker you didn't know it?

A. No, sir; I didn't know it, and I wouldn't believe it, I don't care how many would tell it.

Q. You wouldn't believe it?

A. No, sir; I don't think it is so.

Q. If it was so, you say it was without your knowledge?

47 A. I don't know anything about it. I never heard of Walker until I come here to this trial.

Q. When was the first you knew of that night's proceedings? What is the first thing of this you know after that?

A. I don't remember very much more after I went to old Wilkey's and commenced drinking that jamaica ginger, the last ginger she got. I remember a few things that day, but I don't remember very much. I forget just what I said here before, because I have been sick so much.

Q. When was the next you know of yourself when you found yourself?

A. The next I know of myself I woke up in jail the next morning, and this John Doyle that is here called me to the bars—there was a woman called me to the door and asked me did I know that Annie was dead.

The ASSISTANT DISTRICT ATTORNEY. Don't tell the conversation.

Mr. J. WARREN REED (counsel for defendant). When was the first knowledge that you received that Annie was dead?

A. The next morning, 8 or 9 o'clock.

Q. Who told it to you?

A. That woman there. There was a woman there in jail called me.

Q. That was the first information?

A. Yes, sir.

Q. You got that information that way?

A. Yes, sir; that is the first I knew of it, and I didn't believe it until Doyle told me.

Q. What was done with you after that?

A. They brought me here and put me in jail. They wouldn't let me go to see her.

Q. They wouldn't let you go and see her any?

A. No, sir.

48 Q. They wouldn't take you to see her?

A. No, sir.

Q. Did you want to go and see her?

A. I asked everybody to go to see her. I asked old man Rector, and I asked John Doyle, and he done all he could to get me a chance to go to see her. They said they would fix me; they would take me to Fort Smith. That is what they said.

Q. Did you ever see her after you came here?

A. No, sir.

Q. Did you see any of her relatives after you came here, or any of her folks visit you?

A. When her sister was here, she left here last fall, before she left here she used to come over to see me all the time.

Q. Which sister?

A. Annie's sister. Her oldest sister. She has only got one older sister.

Q. What is her name?

A. Her name was Doyle then.

Q. Mrs. Doyle that lived out there by Dyke's mill?

A. Yes, sir.

Q. She would come and see you ever since you have been in jail?

A. Yes, sir; she come there pretty often and bring me books, and something to eat, and one thing and another. She brought me something to eat several times. She used to come over there. There ain't nobody here now of her own folks that I know of that I knew except just her niece, Miss Doyle's daughter.

Q. Did you ever get to see Annie after you were brought here?

A. No, sir; I just quit trying to get to see her. I never asked here, because I knew it was no use.

49 For the purpose of rebuttal of the evidence of Buck Rogers the Government introduced the following witnesses: Grant Huddleston, Tipton, Rich. Brame, John Gunnawald, whose testimony tended to show that a person standing where Buck Rodgers said he stood could not see the point where defendant and Annie Maledon were at time of fatal shot, and that certain stock-yard structures intercepted the view.

John Campbell, having been duly sworn upon behalf of the Government, testified as follows:

Q. Where do you live?

A. I live at Clarkesville, Indian Territory.

Q. Do you know Andy Crittenden?

A. Yes, sir.

Q. Do you know where he is now?

A. No, sir.

Mr. J. Warren Reed (counsel for defendant). I object. It is not material.

The District Attorney. The only object is to show why he is not here, that he is about, and if the gentleman objects to it I do not care to insist on it.

The Court. Well.

Mr. J. Warren Reed (counsel for defendant). I object to it.

The District Attorney. We want to show that since the last trial of this case that——

Mr. J. Warren Reed (counsel for defendant). We object to any statement about that in the presence of the jury.

The District Attorney. I will not state anything that will prejudice the defendant. That he has been convicted and sent to the
50 penitentiary. If you object to that——

Mr. J. Warren Reed (counsel for defendant). I do.

The Court. You offer to show it, and it is objected to?

The District Attorney. Yes, sir.

Whereupon, after argument of counsel, the court charged the jury orally as follows, which charge was taken down by the court stenographer as follows:

51 Gentlemen, the defendant in this case is before you, charged with the crime of murder, for having willfully and with malice aforethought taken the life of Annie Maledon, by shooting her, as it is alleged in the indictment, with a gun. It is alleged that Annie Maledon was a white woman and not an Indian. Now, there are certain things necessary to be found to authorize you to say that this charge is true, and we will as briefly as possible give them to you in detail, telling you what you are required to find under the law in order to make out the charge. In the first place, you are to inquire of this testimony whether or not Annie Maledon is dead. That is the first proposition to be found by you.

JURISDICTION.

There is one peculiarity connected with this case that is not usually found in cases of this kind, and that is the fact that the deceased did not die in the territory over which this court has usual criminal jurisdiction of cases of this character, but that she died at what is called the
52 St. John's Hospital, according to the evidence, in this city—the city of Fort Smith, Arkansas. She received the wound, according to the evidence, in the city of Muskogee, Creek Nation, in the Indian country, that place being within the criminal jurisdiction of this court. As the law is now recognized in this country that does not make any difference. The principle was thoroughly discussed in this court some years ago—about 16 years ago—when a man by the name of Maddox was implicated in ditching a train on the Missouri, Kansas & Texas Railroad, which runs through the Indian country. The engineer was scalded so he died. He was carried to the town of Parsons, in the State of Kansas, and died out of the jurisdiction of this court. The question was raised whether or not it was triable in this jurisdiction. The court, after an examination of the authorities declaring the law, held that it was. A short time after that the great case which startled the nation

occurred, where President Garfield, on the second of July, 1881, was shot in the city of Washington, D. C., at what is called the Baltimore & Potomac Railroad Depot. He was taken to the President's house—the White House—and staid there some time, and was afterwards taken to Elveron, in the county of Monmouth, in the State of New Jersey, where he died, out of the jurisdiction of the courts of the District of Columbia, and the precise question involved in this case was in that case. That case was carried to the supreme court of the District of Columbia, and, without taking up time to read the case, I give you the decision rendered there:

"Where a wound is inflicted in one jurisdiction and death ensues in another, the offence of murder is committed in the former jurisdiction, and a conviction may be obtained in the courts of that jurisdiction, both at common law and under the Federal statutes."

The reasoning of the court, to my mind, was conclusive upon
53 that proposition. So, although you may find that the deceased in
this case died at St. John's Hospital, in the city of Fort Smith, Arkansas, if you find that she received the wound which caused her death at Muskogee, in this jurisdiction—that is, in the section of the country over which this court has criminal jurisdiction as relating to cases of this character—you may find that this court has jurisdiction to try this case.

THE DEATH.

The next inquiry you are to make is, did Annie Maledon die because she was shot with either a pistol or a gun. The allegation in the indictment is that a gun was used. If the proof shows it was a pistol which was used, it shows it was a gun. That would be responsive to the allegation. The evidence would respond to the allegation of the use of a gun when it showed the use of a pistol, because in law they are kindred weapons; they belong to the same family. One is a gun, and the other is a gun. They both produce a like result in the same way. If you find that the shooting was done with a pistol, from this evidence, then you may find that the allegation is sustained.

The third proposition is, was she shot by the defendant. You are to go to the evidence to ascertain that.

THE MEANING OF "WILLFUL."

The fourth proposition is, was the shot fired willfully and with malice aforethought. It is necessary in this connection that we should define the word "willful"—tell you what is meant by it. It is claimed for the defendant that it was either an accident, or, if done at all by him, and
there was anything to it to show it was not an accident, it was
54 done under the influence of a state of such drunkenness as that it
would be no crime. It is necessary that you should carefully note the meaning of this expression "willful," or "willfully done." "Willful" means intentional and not accidental. It is contradistinguished from that which is an accident. It is opposite it. What is an accident, in the law, in legal contemplation? What is an accident which grows out of the use of firearms or deadly weapons? Because that is the class of cases we are now discussing. The law says it is something which

occurs after the exercise of the amount of care a man is required by the law to exercise to prevent its occurrence. If it occurs notwithstanding that care is exercised, it is then called an accident. It is then denominated an act that is a misadventure, as something not criminal. Now, what amount of care does the law require, when a man is handling a dangerous or deadly weapon? The amount of care, you will observe, is always in proportion to the extent of the danger. If the danger to life is very great, because of the character of the weapon, or the manner in which it is used, the degree of care is proportionately great, because the great object of this preserving and protecting power called the law is to protect innocent human life either against carelessness or recklessness or against that which is prompted by a specific design, or from a specific purpose. Therefore, if a man does not exercise that reasonable care which he can exercise under the circumstances, when handling firearms, his act passes out of that classification known as an accident. It is not an accident. It is a crime. It has intent connected with it. It is a crime of some kind. That is what is meant by an accident.

All cases where human life has been taken, outside of an accidental killing, are cases where intent exists. They are denominated by the law as intentional. The law says, if a man with a gun or pistol uses it willfully or intentionally, in such manner as to produce death, the
55 production of death is regarded as a willful act, or the death is
willful, the death is intentional. It means that, if it be a case where a shooting has occurred, and the man shoots intentionally and purposely, if he kills intentionally he does such killing willfully. You find he does it in that way by the manner in which it is done. That is the way you may find it, and it is the only way you can find it, because his purpose, of course, is a condition of the mind, and you can find it shadowed forth by the way he acts, by his conduct, by the nature of the action done by him. You may also find it by other signs, by other indications of the condition of his mind. For example, a man threatens to do a thing. The threat itself, when the thing is not done, while it is some evidence of a criminal purpose, may not be so conclusive, because it may be a heated threat; it may be a threat made in such a way as that the party recalls it and does not act upon it; but where you have an act done which produces death, as, in this case, the act which produced the death of Annie Maledon, and you are seeking to characterise that act, if you believe that the party presented a pistol at her and fired it at her, you have an act which would ordinarily satisfy the minds of reasonable men that he is doing an intentional thing, and consequently a willful thing, and the known connection between death and a thing of that kind is so intimate that the law says you are not only authorized to find, under such circumstances, that the death was willful, but it is your duty to do so. You may find further light upon that subject when you come to consider whether or not he made any threats along that line indicating a purpose of that character, because where threats are simply made and not executed they may be uncertain indices of his mental condition. When
56 they are executed, when the purpose is executed in harmony with
the threats, the threats go to sustain the character of the action which surrounds the act done by him, and to show that it was willful. One man threatens to take the life of another. He prepares himself by get-

ting a deadly weapon, and when occasion offers he takes that life. Ordinarily, when we come to pass upon the question as to whether he had the intent to take that life, we would take into consideration the reflection of his criminal purpose, the reflection of this deadly purpose as evinced or shown by the threats made by him. Not only that, as I will remind you a little more fully presently, these threats, when they are executed, when the execution of them is in harmony with the nature of the threats, become evidence of deliberation, become evidence of premeditation, become evidence of a formed design to take life conceived beforehand, deliberated upon, premeditated, and consequently they become evidence of malice aforethought.

A word or two further as to how you may find whether an act was done willfully or not. The law says that—

"A sane man, a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts."

We are all held by the law to have intended the consequences of what we do. If a man presents a pistol at another and fires it and the other is killed as a consequence, the law says we are held to have intended to kill that other when we do an act in that way.

"If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it."

We are told here, you see, that we may take into consideration the act as done by him to see what the character of that act was. As
57 I have already remarked to you, that act may be of such a character as alone to satisfy us that it was a willful act, because you will bear in mind that although these weapons of death are terribly destructive they will never destroy life when let alone. They are passive. They have no will power. They are so constructed that they must be acted upon, and the very fact they must be acted upon goes to show—when they have been acted upon, when action has taken place—there was some will power which thus acted upon them. Now, that fact alone, when we see a weapon used in that way which implies the intentional use of it, goes to show us that the party intended to use it in that way. In other words, you may take the weapon as used, see how it was presented, whether it was accompanied by threats of a deadly nature at the time, whether that act was preceded by threats of that nature, and if you should find these facts existing, what would you usually conclude, as reasonable men, if such a proposition was presented to you—that is, if you were required to find whether or not he willfully shot the girl or not? If you would usually find that the evidence of that character showed that he willfully fired upon her, you are authorized to find it here, from looking at the testimony, because it is the testimony which usually satisfies the minds of reasonable men of a purpose of that character, of an act of that nature.

That, now, is the first element of the crime of murder.

THE MEANING OF "MALICE AFORETHOUGHT."

There is another element of the crime of murder called malice aforethought. That means the doing of a wrongful act which results in death without just cause or excuse, or in the absence of facts
58 which mitigate it. A man, in other words, takes a life willfully or intentionally, and there is nothing in the evidence to show he had a right to take it under the law. There is nothing in the conduct of the party killed—in this case Annie Maledon—at the time of the killing which can be taken into account under the law to mitigate that act or to reduce the grade of it from murder to manslaughter. You have then a state of case which shows the doing of a wrongful act without just cause or excuse, or in the absence of facts which reduce the grade of the crime resulting in death.

The law says, again, that this characteristic is defined and known as a condition which indicates that the party who does the killing does it in such a way as to indicate that he had a heart void of social duty and a mind fatally bent upon mischief. That is to say, he did the killing so wantonly, so recklessly, and so wickedly as to indicate that he threw off these responsibilities which are upon all of us, and which grow out of the social duty which we owe our fellow-men. That is the very highest duty which rests upon us, and that duty is not to destroy human life, but to protect it. We are commanded to do it, to stand up in defense of it if it is innocent and in danger. When we so far forget that duty as to recklessly, wantonly, and wickedly slay, the law says that is malice aforethought, because it shows we have a heart void of this social duty, and a mind which does not recognize any longer the social duty resting upon us. We are doing, in other words, a wrongful, a wicked, a reckless, a wanton, a diabolical act which deprives a fellow-being of life. That is malice aforethought. The very fact we deprive a person of life in that way shows we have a mind fatally bent upon mischief. The very execution of that design shows it.

A word or to further as to how you may find the existence of this characteristic known as malice aforethought.

59 "The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind, are to us, or to any one outside of the individual, exhibited by the acts which the individual performs, and we are entitled to infer what his intent was, what were the processes of his mind and the feelings of his heart by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was."

Threats made by him—deadly threats—as in the case where you are hunting to see whether it was done willfully, may be taken into account to show it was done with malice aforethought, because you will bear in mind there are two methods by which we can get at mental condition. We can only arrive at it by signs. Words used by us are signs of mental condition. If a man is constantly belching out deadly threats against another human being, they may be shown, as I have remarked. They may be mere idle bravado, and, if standing alone and not executed, they might not be a reflection of a sedate, deliberately formed design to kill; but if you follow along the line of these threats, and you find the human life which was thus threatened was destroyed in pursuance of such threats, apparently was an act done in harmony with the threats, you have a confirmation of the serious character of the threats, of the deliberate character shadowed forth by them as made, and you may therefore, in hunting for a deliberate and premeditated condition which resulted in the death of Annie Maledon, in this case, in the mind of this defendant, and which, if existing, controlled that mind, take these threats into consideration. You may find their nature, find whether they were deadly in their character, find whether they had a motive which brought them into existence. As I will tell you after a while more in detail, it is not necessary to authorize you to find any characteristic of the crime of murder, or of the fact even, where that is the issue, that a particular party has committed that crime, to show motive, yet if you find it, and you find the 60 threats are in line with that motive, and you find the killing is in harmony with that motive and these threats, you have but a concurrence of conditions which makes it even stronger than it would be if you had standing before you an act done apparently without just cause or in the absence of reasonable provocation.

"As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances, no case in which it is demonstrated as express. We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, it is not necessary to prove that such design existed for any definite period before the fatal blow."

Let us see whether that is reasonable or not. A large number of these rules of the law are deduced from what reasonable men do ordinarily. You see A shoot at B with a deadly weapon—a pistol, for example—and take his life. You see him shoot him in the back. B is running, it may be, or seeking to get out of the way, controlled by a state of fear or alarm. When you find the weapon used in that way, and you see it used in that way, and there is no excuse for using it, legally or otherwise, nothing of the kind to be offered which could by the law, at any rate, what would you infer, from an act as done in that way, as to whether the party had thought of it beforehand? You would ask yourself the question, if this proposition was stated and became a matter of discussion, How could he do it unless he thought of it beforehand? How could he put the pistol in that position unless he first thought of putting it in that position? How could he pull the trigger, under the circumstances, unless he first thought of doing it? The very fact he thus deliberately, thus premedi'atedly, thus intentionally, uses that 61 weapon shows it was thought of beforehand, because he could not do the act without first thinking, and it is not necessary, in order to make out deliberation, to make out preparation, to make out premeditation, that a man should think of killing another for months, for days, or for hours. If he conceives the thought to take life at the time he takes it, and thereupon takes it, and he does it without just cause or excuse, or in the absence of provocation or mitigating facts, facts which reduce the grade of the crime, he has thought of it sufficiently long to show premeditation, because he must have thought, he could not act unless he thinks, and the very fact he thus acts indicates that he premeditates.

"From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant. We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. Put thus baldly, the statement of the proposition is hardly fair to the defendant. It is true, if that is all the evidence in the case, proven the death, proven the slaying with a deadly weapon, and stopping there, we are warranted in inferring malice, and therefore finding the crime to be murder."

That is, when a state of case is presented where the simple fact that death has been produced by violence, by the violent act of another, is established, so that we are authorized, if there is nothing else shown, to find the existence of malice aforethought. Now, that rarely ever happens, because, as in this case, when you have the evidence showing the shooting of Annie Maledon you have evidence showing the method of that shooting. You have the condition which led up to it. You have the threats brought in here, made, as is claimed by the Government, by the defendant along that line, or in that direction, and, as a rule, these facts, where a killing is thus proven, are facts which accompany and come
62 out with the proof of the killing and go to illustrate it, go to show whether it was wickedly and wantonly done, without just cause or excuse. And it is these circumstances which stand around the transaction which are to be taken hold of by the jury to enable them to intelligently characterize the act and say whether it was murder, or what it was.

It is very rare, as this judge says, that the mere fact of the killing is all the evidence in the case.

"Your own experience, from what you have heard and what you have read, certainly must have instructed you that there is hardly ever, if indeed ever—I never heard of one—a case where the only fact proved against the defendant, or the only fact proved in his favor, was the killing the deceased with a deadly weapon."

You can not get that as an abstract fact without these other things accompanying it. The proof shows why he killed, and the proof shows how he killed. The proof shows all the facts and the particulars surrounding the transaction, and it is by these that the transaction is illuminated so that the jury are able to see it and to intelligently pronounce its character.

"The moment a single other fact is admitted into the case this statement of the proposition becomes misleading, unless the jury bear in mind the caution which I will now give. Malice is to be inferred from all the facts in the case. If malice is found it must be drawn as an inference from everything that is proved, taken together and considered as a whole. Every fact, no matter how small, every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time they consider the use of the deadly weapon, and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred.

"To murder, the existence of malice is absolutely essential."

Now, gentlemen, that is the definition of this second expression, of the second characteristic of the crime of murder.

If there is a killing done without malice aforethought and is yet a crime, that crime is known as manslaughter, because manslaughter is defined by the law as the killing of a human being willfully and intentionally, but without malice aforethought, in the absence of that
63 which shows that the party had a mind fatally bent upon mischief,
or had a heart void of this social duty, or where there is an absence of that wanton, reckless, and diabolical wickedness as going to characterise the killing. If that is out of the case, and there is in it simply the element which makes it a willful act in legal contemplation, it is not an accident, but it would be known as manslaughter. Now, there could be no manslaughter in this case, under the law, unless there was that condition of drunkenness going to characterise the defendant at the time of the killing which would authorize you to take that condition into consideration and reduce the grade of the crime. I will call your special attention to that after awhile, because it is a question that has passed through this court and all the courts of the country as to what that condition may be, and it is well established, is well defined.

MOTIVE.

As I have already told you in this connection, to find malice aforethought it is not necessary to find motive. If you have motive you have a right to take it into consideration. It the better enables you to see what the condition of the mind of the party was, because sometimes we may be led into a state of doubt as to what was the condition of the mind when we have nothing before us but the bare act of shooting, but if we have a mental condition which leads up to that and produces it, it is a fact which is competent, we are authorized to take it into account, and it may produce the conclusion more satisfactorily than if that state of case did not exist.

Judge Landon, in his charge delivered in a case tried at Saratoga, the case of Jesse Billings, for murder, said:

"I first speak of motive. No man commits a crime without some motive leading him to do it. That motive may seem to be strong or weak. You are not to inquire whether the motive is one which would ordinarily lead to the commission of the crime charged. It is
64 difficult for the mind that is fortified by the consciousness of its
own rectitude to conceive of an adequate motive for any crime. No motive will lead an entirely just man to the commission of any crime. You could not be moved to take the life of your fellow-man except in the just defense of your own lives or rights, or the just defense of the lives and rights of those whom it is your duty to defend. But just defense is no crime. You may, however, properly inquire what motives do lead to the commission of crimes. And you will find where men's consciences and morals are depraved they are often led into the gravest of crimes by the simplest of motives. A small sum of money, a word

spoken in anger or insult, wrongs real or imaginary, revenge, jealousy, hatred, envy, and malice often lead to the crime of murder."

These are proper things to be taken into account to see whether the party contemplated the act, to see whether he thought of it beforehand, to see whether he took it into consideration before he did the act, not that that is necessary, because if he conceived the purpose to kill at the time of the slaying, and executed that deadly purpose at that time in consequence of a deadly design then and there conceived by him, and there is nothing in the case to show that he had a right to do that, nothing in the case arising from the conduct of Annie Maledon, in this case, that you can take into account to mitigate that crime, that would show malice aforethought as arising from the deliberate and willful act which resulted in her death, and you might find it from that act alone—but, I say, you may take this condition into account, you may take this motive into consideration for the purpose of the better enabling you to tell whether it was deliberately and premeditatedly done, and then for the purpose, in this case, of enabling you to see whether these threats were intentional. If there is a motive for the threats, if they are made along such a line, or if they go to characterise such a course of conduct as to indicate that there was a cause for making the threats, because of their execution they become competent to enable you to say what weight is to be attached to them.

A word or two further upon the subject of motive.

65 The law says that "a man unaccustomed to control his passions, and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion until he determines that only the blood of the supposed offender can relieve the pang. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately proportionate to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs. When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraint."

Reason is dethroned by passion. The mind is not normally controlled. It is controlled by something which is not the proper ruler of it, and the man consequently becomes a criminal. He commits a crime because of his mental condition. Now, it is exactly that condition which shadows forth the existence of malice aforethought, and we may see it as it is shadowed forth by the light of these circumstances, by the light of these facts which are given to us.

A word or two further upon this subject. You will bear in mind that to the existence of malice aforethought special spite is not necessary. A man may kill another because of special spite, grudge, or ill will arising from jealousy or some other motive, and when he does it for that reason that evidences malice aforethought, but there may be an entire absence of such a relation as that there could grow out of it this special spite, grudge, ill will, or animosity. In other words, the party may be so reckless of human life as to not care whether the possessor of it enjoys it or

not, and when he takes a life in such a way as to show a feeling of that kind, then the law says that his act is prompted by a conception of what is called in the law general malevolence, general recklessness of human life, general hatred of his race and of mankind to such an extent that
66 he is indifferent whether he becomes a destroyer of human life or
not, and because of that feeling, because of a supposed affront received by him he becomes the destroyer of human life, and when he does that it evidences the existence of malice aforethought as much as in a case where it grows out of special spite, grudge, or ill will, and the killing is in consequence of that.

As was said by the court in its charge in the Guiteau Case:

"Malice aforethought does not mean that it can be proven on the part of the accused that there was no special spite, ill will, or grudge against the deceased, against the party killed. When a homicide is shown to have been committed without lawful authority and with deliberate intent, such unlawful killing, done with such deliberate intent, is sufficient to show it to have been done with malice aforethought."

Then ask yourselves the question, in this connection, Was this killing done without lawful authority? That is one of the propositions which may be taken into account, says that eminent jurist in his charge to the jury in the Guiteau case, in finding whether malice aforethought exists or not. When it is shown to have been committed without lawful authority and with deliberate intent, such unlawful killing, done with such deliberate intent, is sufficient to show it to have been done with malice aforethought. How are you to find this deliberate intent? Of course, to have lawful authority there must be some principle of the law which gave him the right to take that human life. There is none claimed for the defense. It is not claimed he had a right to do that. Now, then, how are you to find this deliberate intent? In the manner I have already indicated, by the selection and use of a deadly weapon unlawfully and improperly, coupled with the threats of the killing at the time of the killing. That shows premeditation. That premeditation and that deliberation is evidenced by the preparation to do the deed, and by the purpose to do it as evinced by the deadly design shadowed forth by the threats made by him.

67 DRUNKENNESS.

It is claimed for the defendant in this case that at the time he did this act of killing he was drunk. It becomes necessary, therefore, to tell you what figure drunkenness may cut in a case, how far you may relieve a man of a crime growing out of the taking of human life because he was drunk, and I call your especial attention to this proposition. The proposition has had deliberate consideration in this court many times. It has often been before the Supreme Court of the United States. It was before that court recently in a case tried here where the party was convicted of murder for shooting a woman—the case of the United States v. Marshal Tucker. That case went to the Supreme Court. I shall read to you a part of the charge upon the subject of drunkenness, and the doctrines enunciated by this court upon that subject were affirmed by the Supreme Court of the United States.

Mr. Bishop, in his New Criminal Law, section 401, says:

"The law divides indictable offenses into murder and manslaughter, but the specific intent to kill is not necessary to either. A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime, and the doctrine is that the intention to drink may fully supply the place of malice aforethought, so that if one voluntarily becomes too drunk to know what he is about, and then with a deadly weapon kills another, he commits murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from each act its indictable quality."

That is the doctrine upon the subject as contained in that authority. I read to you, briefly, from the case of Marshal Tucker, passed upon by the Supreme Court of the United States upon that point, and then I will read to you substantially the charge given in this case by the court below. The Supreme Court, referring to a previous case decided by it wherein the question of drunkenness was also involved, the case of Haupt v. Utah, 104 U. S., 631, said:

68 "In Hopt v. People, 104 U. S., 631, this court recognized the general rule that at common law voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence; and went no further in favor of admitting evidence of intoxication than to hold that a defendant indicted under a Territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition by reason of drunkenness as to be incapable of deliberate premeditation.

"No act of Congress has established degrees of the crime of murder. By the common law neither deliberate premeditation nor express malice or intent to kill is required to make an unlawful homicide murder, but malice may be implied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter. It has often been held, and was formerly considered to be settled law, that a wanton killing without provocation could not, by reason of being done by a man voluntarily intoxicated to any degree not amounting to insanity, be excused, or reduced from murder to manslaughter."

That is the language of the Supreme Court of the United States in the Marshal Tucker Case which went up from here.

We now come to the charge delivered by the court here in that case, which reviews the doctrine fully upon the subject of drunkenness, and tells you what figure it may cut in a case. It is claimed in this case, as it was in that, that the defendant was intoxicated at the time he killed Annie Maledon, or shot her. That makes it necessary, as I have already told you, that I should give you the doctrine of the law upon that subject, and tell you what figure drunkenness cuts in the case. We must be governed in this respect by the law, as in all other respects, because we have no business outside of the law. When we are called upon to enforce it we must observe its rules. When we have found these rules which it gives us we are to be governed by them. We can not escape that.

And there is no reason in this case why the rules of law should be perverted one way or another. They should be followed strictly. Now, the rule varies but little in this country and England, from the law of which country it is derived, and I call your attention to the rule 69 of that country as recently proclaimed by the courts there in the case of Regina v. Davis, quite a recent case in English jurisprudence, and which contains so excellent an exposition of the law as it is understood in that country that we can not refrain from quoting it in full. The facts in that case were that Davis, aged 38, was charged with feloniously wounding his sister-in-law, Jane Davis, with intent to murder her. If he had killed her he would have been charged with murdering her, because in attacking another with intent to murder him is but one step from murder, and the only difference there is, in one case the party does kill and in the other he does not. If a party is charged with shooting with intent to murder another, that means he did it with malice aforethought—that he did it willfully and with malice aforethought.

"He had been previously drinking heavily, but on the day of the attack was sober. He threw her down and attempted to cut her throat with a knife. Usually he was a very mild, quiet, peaceable, well-behaved man, and on friendly terms with her. When at the prison he said, 'The man in the moon told me to do it. I will have to commit murder or I must be hanged.' Two medical men, after examining him, testified that he was suffering from delirium tremens, resulting from overindulgence in drink. They said he would know what he was doing, but his actions would not be under his control. In their opinion, neither the fear of punishment nor legal nor moral consideration would have deterred him. Nothing short of actual physical restraint would have prevented his doing as he did; that he was disordered in his senses and would not be able to distinguish between moral right and wrong at the time of the commission of the act. He recovered in a week and was then perfectly sensible.

"His counsel claimed that he was of unsound mind at the time of the commission of the act, and was not responsible for his actions."

Now, of course, an unsound mind, so as to take away responsibility, means insanity. That is what it means—insanity. An unsound mind, so as not to be responsible at all, means that a man is insane, because that is the only degree of unsoundness that the law recognizes as one that commonly excuses a man from an act which results in death which otherwise would be criminal.

70 "Judge Stephen charged the jury as follows: 'The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last, with the intent to murder her. You will have to consider whether he was in such a state of mind as to be thoroughly responsible for his actions. And with regard to that I must explain to you what is the kind of degree of insanity which relieves a man from responsibility. Nobody must suppose—and I hope no one will be led for one moment to suppose—that drunkenness is any kind of excuse for crime. If this man had been raging drunk and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question; but drunkenness is one thing and the disease to which drunkenness leads are different things; and if a man by drunkenness brings on a state of mad-

ness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible.'"

That is a condition of insanity. He has delirium tremens. He loses his mind. He is then insane just the same as if he would lose it from taking any other narcotic, any other stimulant, or lose it by means of a blow on his head, or anything else. The test is, whether he had lost his mind so far as not to know whether it was a right or wrong act that he was doing at the time. That is insanity. Of course, when that is produced, as this great English jurist remarks, by intoxication, it is just like insanity produced from any other cause. A man may be insane from birth, or he may be insane from a blow on his head. The test is, whether or not he knew right from wrong at the time of the doing of the act, with reference to that particular act.

"In my opinion, in such a case, the man is a madman, and is to be treated as such, although his madness is only temporary."

He is giving the law concerning the defense of insanity. A little further on he continues:

"A person may be both insane and responsible for his actions, and the great test laid down in McNaughton's Case (10 Cl. & F., 200; 1 Car & K., 130n) was whether he did or did not know at the time that the act he was committing was wrong. If he did, even though he were mad, he must be held responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you can not think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, any disease which so disturbs the mind that you
71 can not perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong. Delirium tremens is not the primary but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act."

I will now call your attention to a leading American case where the principle is laid down as to what figure drunkenness cuts in a case.

One of the leading cases in this country upon this subject is The People *f.* Rogers (18 N. Y., 9). Rogers was indicted for killing another with a knife, and on the trial evidence was introduced, without objection, to show the prisoner was drunk at the time of the murder. His counsel requested the court to charge the jury that drunkenness would reduce the crime to manslaughter, which request was refused. In speaking of the maxim that drunkenness is no excuse for crime, the court said:

"It will * * * occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is, no doubt, considerable difference between a murder deliberately planned and executed by a person of unclouded intellect and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to moral qualities of individual conduct. But there is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is the duty which everyone owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, as far as lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable."

That has reference to a state of insanity.

"But if by a voluntary act he temporarily casts off restraints of reason and conscience no wrong is done him if he is considered answerable for any injury which in that state he may do to others or to society."

I will now read you the law as declared in a case tried in the State of Tennessee.

72 "Another leading case upon this subject is Cornwell v. State (Mart. & Y., Tenn., 147). This is an earlier case than People v. Rogers by thirty-one years. The prisoner was convicted of murder, and urged his intoxication as an excuse. To this it was answered:

"'Three cases of conviction for murder have been brought before this court at the present term in which the prisoner was defended in the court below on the ground of madness, occasioned by drunkenness, and yet in neither does it seem to us was there a colorable foundation for such a defense. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these cases very intenable positions have been assmued, and very dangerous doctrines have been announced by counsel. And, from what was stated by some of these counsel, those doctrines have been repeatedly urged, and sometimes sanctioned in the courts below. It has become fashionable of late to discourse and philosophise much on mental sanity and insanity. New theories have been broached, and various grades and species of mania have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs. Whatever difference of opinion there may be as to the construction and operation of the mind of man, whatever difficulty in discovering the various degree of unsoundness, it is only necessary for us to ascertain the kind of prostration which is requisite to free a man from punishment for crimes by the law of the land. It is with this alone we have to do. We put our feet in the tracks of our forefathers. Let us then for a moment resort to the sages of the law of different ages and learn from them whether that species of frenzy which is produced by inebriety constitutes any excuse for crime, and what sort of insanity it is which will serve this purpose.'"

After reviewing the English authorities the court proceeds as follows:

"In order to be clearly understood we have supposed the strongest case, a case of entire prostration of intellect immediately occasioned by drunkenness, and have said that that constitutes no excuse. Instances, however, of heinous offenses committed under such circumstances are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober.

"Another case on this subject often quoted and cited is Choice v. State, 31 Ga., 424 (decided in 1860, quoted approvingly in Goodwin v. State,

96 Ind., 550, 579), the opinion being delivered by Chief Justice Lumpkin, that legal luminary of the South. He said: 'Whether anyone is born with an irresistible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capitally doubt whether it can ever be. And if it were, how far this crazy desire for liquor would excuse from crime it is not for me to say. That this controlling thirst for
73 liquor may be acquired by the force of habit until it becomes a
sort of a second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immutably, and from it nothing can dislodge me but an act of the legislature, namely, that neither moral nor legal responsibility can be avoided in that way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more nor less than this: That a want of will and conscience to do right will constitute an excuse for the commission of crime, and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrongdoing. If this doctrine be true—I speak it with all seriousness—the devil is the most irresponsible being in the universe. For, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder until it is as hard for an Ethiopian to change his skin as for them to cease to do evil; but the inability of Satan to control his will to do right is far beyond that, and yet our faith assures us that the fate of Satan is unalterably and eternally fixed in the prison house of God's enemies. The fact is, responsibility depends upon the possession of will, not the power over it."

There it is, exactly. Responsibility depends upon the possession of will, and not the power over it.

"If a man destroys his power over his will, if he still has will, he is responsible.

"Nor does the most desperate drunkard lose power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will when he takes his cup. It is for the pleasure of the relief of the draught that he takes it. His intellect, his appetite, and his will all work rationally, if not wisely, in his guilty indulgence, and were you to exonerate the inebriate from responsibility you would do violence both to his consciousness and to his conscience, for he not only feels the self-prompted use of every rational power involved in accountability, but he feels also, precisely what this new philosophy denies, his solemn and actual wrongdoing in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, just compose him so as to reach his clear, constant experience, and he will confess that he realizes his guilt, and therefore the responsibility of his conduct. A creature made responsible by God never loses his responsibility save by some sort of insanity. There have always existed amongst men a variety of cases wherein the will of the transgressor is universally admitted to have little or no power to dictate a return to virtue. But mankind have never in any age of the world exonerated the party from responsibility, except when considered to have lost rectitude of intellect by direct mental aberration."

Again, reading from the case of People v. Ferris, from the State of California:

"No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in such a condition. The fact of intoxication alone, as it is declared by a 74 well-settled rule of law, is no excuse for the commission of crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated. And drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution."

You will learn presently how far it may be considered for the purpose of reducing the grade of the crime. I am calling your attention now to this degree of drunkenness which produces insanity, a fixed condition of the mind where the man is no longer responsible, where he is no longer capable of discerning right from wrong with reference to the particular act done. Then, of course, the party is excused, not upon the ground of drunkenness, because that is the only cause which produces that condition, but upon the ground of insanity.

"Great caution," Mr. Wharton says, "is undoubtedly necessary in the application of this doctrine, for, as has already been remarked, there are few cases of premeditated violent homicide in which the defendant does not previously nerve himself for the encounter by liquor, and there would in future be none at all if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation aliunde, and where the defendant is proved at the time of the occurrence to be in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life or that there was no positive premeditation.

"To disprove malice, voluntary drunkenness is irrelevant."

"It can not be taken into account for the purpose of showing an absence of premeditation if the proof, and the whole proof, shows the doing of a deliberate act, a premeditated act."

That is to say, you take into consideration the evidence. You look to see whether the threats were made, whether they were of a deliberate character, whether in pursuance of these threats the shooting occurred, and as a consequence, Annie Maledon was killed. If so, then you 75 have evidence of premeditation. There may have been a state of drunkenness affecting the defendant. He may have been excited by liquor. The defendant may have been under the influence of drink at the time, but if there is still a premeditative purpose to kill as evidenced by the threats, as evidenced by the spirit of jealousy, as evidenced by the selection of the weapon, as evidenced by the manner of the killing, you have a state of case which shows premeditation, shows there is absent

from that condition known as the killing that which would reduce the grade of the crime, and thus to acquit a party until it produces insanity, and then insanity may be used for that purpose. Nor can it be used to reduce the grade of the crime, unless it produces a condition in the mind of the party where he is incapable of thinking. Now, that is the test, as I will give you presently. If he was in a condition of mind at the time he was so acting, at the time of the killing, that his mind was so disturbed by drink, by a drunken condition, so that he was incapable of forming any intent, or an intent to do a wrongful act which might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder, but in the language of the law I have read to you, great caution is to be used by the jury in making application of this principle, because voluntary intoxication, although it may inflame the mind of the party, although it may excite the mind of the party, although it may prompt him the more readily, the more quickly, to do a reckless or wanton act, if it is a state of case where he has deliberation of purpose, where he has premeditation of purpose enough to draw and present and fire a deadly weapon, which results in the taking of the life of another, intoxication in such a condi-
tion as that is not a mitigating fact, unless that intoxication goes
76 to the extent to put the mind of the man in the condition that the
mind of a man was put in in this State where he was excused under the law dec*al*red by the supreme court of this State on the ground that he was incapable of having any intent, of forming any conclusion. When a man is in a condition where he can form an intent to do a willful act which may result in death, and he does deliberate and form that intent, as evidenced by the threats made, as evidenced by the selection, the drawing, presenting and firing of the deadly weapon, then intoxication does not mitigate his offense. If he is carried beyond that, although he may not be absolutely insane, so his will power is gone, he has no control over it so he can restrain it, while there may not be insanity, then there is an absence from the case of that which is denominated by the law as malice aforethought. That contemplates the existence of a state of facts where he is incapable of forming a deliberate design, forming a consecutive purpose to execute a deadly purpose, first making threats to execute that purpose, and then executing those threats.

That is the figure which drunkenness cuts in a case, and I do not think it is necessary to detain you longer upon that.

DYING DECLARATIONS.

There are but few other things to be said in this case, and they pertain to the evidence which has been offered here. You have had offered before you what is called dying declarations of the deceased, Annie Maledon—declarations made under the apprehension of death. The law contemplates that that apprehension—the contemplation of the fact that the party is soon to be ushered into eternity and be made responsible for
everything said—that it is so impressive in its character upon the
77 human mind that it takes the place of an oath and a cross-exam-
ination in court; that it takes the place of those means to secure truth; and it does even more than that, because the human mind is so

constituted that if there is ever a time when it is impressed with the consciousness of truth it is at this time. Every element which it possesses converges toward that point, and for that reason it declares when they are found by the court to be such—to be made under the apprehension of death—they may go to the jury as competent evidence in regard to the manner of the occurrence, and the details and circumstances which led up to it, and as to how it was executed at the time.

"The admission of this testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose."

Now, in regard to this sort of evidence, as it is with all other items of testimony, it is well to see whether there are any other circumstances corroborating it or not; any other facts that corroborate it in the shape of the location of the wound, the place where the wound was inflicted, and the condition of the clothing upon the person of the girl at the time she was shot, and any statements of any other witnesses as to facts which existed as surrounding that transaction. These things are all to be taken into account to see whether they corroborate the statement of the dying woman, or the woman who made them under the apprehension of death. If they do, they are strengthened as any other testimony is strengthened. If they do not corroborate it, that testimony stands upon its own inherent strength, upon its own consistency, upon its own probability, its own naturalness. It may be of itself sufficent to establish the manner in
78 which the killing occurred. But then you are to gather up all
the accusatory facts, all the accusatory circumstances, and see what they tend toward showing, what conclusion they tend to produce.

THE EVIDENCE IN GENERAL.

Now, you will bear in mind, in this case, if you are satisfied beyond a reasonable doubt, under the law I have given you and according to this evidence as you have received it, that the crime of murder has been committed, it is your duty to say so. You have no right to say something else than that when you are convinced beyond a reasonable doubt that that is the true state of case. You would be perverting the purpose of the law as much to find manslaughter here, if you are satisfied under the law and by the evidence that manslaughter does not exist, but that murder exists, as though you were to acquit of all crime. This woman, though she may have been a fallen woman, a woman of lewd character, she was still under the protection of the law, and so far under its protection that she could not be wrongfully, improperly, and illegally robbed of her life. Her life could not be taken away in that manner because she was that kind of a woman; she could only forfeit it by crimes committed by her which are declared by the law of such a character as to warrant a forfeiture of a human life. She stands before you entitled to the full measure of the law's protection; and not only that, but she, as well as the living, is entitled to a full vindication of this law, if it has been violated, a vindication of it to the fullest measure to which it has been violated.

You are the judges of the credibility of this evidence, and of all of it.

79 You are to take into consideration the interest witnesses have in the case, their manner of testifying, the fact as to whether they have made statements at other times different from what they may have made upon the stand. The defendant goes upon the stand and makes his statements. You take them for what they are worth, in the light of his condition, in the light of his relation to the case, and, above all, in the light of the other facts. If the other facts contradict him, or other facts establish a state of case that what he asserts does not establish, you have the right to look at that evidence in the light of the other facts, in the light of the other testimony, in the light of the other evidence which has gone before you from these witnesses.

PRESUMPTION OF INNOCENCE AND PROOF BEYOND REASONABLE DOUBT.

Gentlemen, the law says if you are satisfied beyond a reasonable doubt of the truth of this charge your duty is to convict of that crime you may be satisfied the party has committed. If you are satisfied, as twelve reasonable men, to the extent that you have an abiding faith to a moral certainty that the crime of murder has been committed, your duty is to find the defendant guilty of that crime. If you find this crime has not been committed, but the other has, your duty would be to convict of that. If you believe no crime has been committed, if you are not satisfied that crime has been committed to the extent required by the law I have named, then you would be required to acquit.

Every person charged with a crime starts into the trial with the presumption in his favor that he is innocent. That presumption remains with him until it is overcome by the proof offered upon the part of the Government. It is overcome when the case is proven beyond reasonable doubt.

80 You understand what is meant by reasonable doubt. It means the proof of these several propositions, the one showing that Annie Maledon is dead, that she died of violence of the kind named in the indictment, that that violence was inflicted by the defendant, and that it was inflicted in such a way as to make it criminal violence. If they have been established so you, as reasonable men, are so satisfied of the truth of them that you would be willing to act upon a conclusion formed by you relating to any other great concern or great affair in life which you are called upon to first pass judgment upon and then act upon that judgment; that is all that is meant by proving a case beyond a reasonable doubt, so that it satisfies a reasonable man to that degree of certainty that he can say he believes the truth of the charge, and then take whatever action duty calls upon him to take in regard to that belief, or as growing out of that belief. That is proof beyond a reasonable doubt, and when the case is established in that way it makes the crime. When there is a failure to establish it to that extent there is a failure to prove crime.

Gentlemen, you will find forms upon the back of this indictment for your verdict, and you will retire to make up your verdict in the case.

Defendant's exceptions to charge of court.

To which charge of the court the defendant, in the presence of the jury, and before they had retired to consider the cause, then and there excepted as follows, to wit:

I.

That the court did not give the law correctly upon the subject of the deceased being shot at Muskogee, Ind. Ter., and dying from the wound in Fort Smith, Arkansas.

81 II.

That the court did not give the law correctly upon the subject of an accidental killing with a weapon, and the use of a weapon, and killing by misadventure.

III.

That the court did not give the law correctly upon the subject of the use of a weapon and intent to kill.

IV.

That the court did not give the law correctly upon the subject of threats as evidence of intent to kill; that the same is argumentative and misleading.

V.

That the court, in effect, told the jury that they could not reduce the grade of killing from murder to manslaughter (?); that there was no manslaughter in the case.

VI.

That the court did not give the law correctly upon the subject of malice aforethought and threats, as applied to a condition showing malice and intent to kill.

VII.

That the court emphasized the word "threats" by the use and prefix of the word "deadly threats"—argumentative and misleading when there was no evidence to justify such classification.

VIII.

That the court did not give the law correctly upon the subject of premeditation and the use of a weapon, classing it as a deadly weapon—argumentative and misleading. 82

IX.

That the court did not give the law correctly upon the subject of the *o*se of, and killing with, a weapon.

X.

That the court did not give the law correctly upon the subject of manslaughter.

XI.

That the court did not give the law correctly upon the subject of motive to commit crime.

XII.

That the court told the jury that there was nothing in deceased Annie Maledon's conduct in this case to reduce the grade of crime from murder to manslaughter—argumentative and misleading.

XIII.

That the court did not give the law correctly upon subject of special spite in connection with and evidence of malice aforethought.

XIV.

That the court did not give the law correctly upon the subject of drunkenness as an excuse for crime, and drunkenness taking the place of malice aforethought.

XV.

That the court did not give the law correctly upon the subject of insanity as produced by drunkenness and the grade of crime that may attach thereto. 83

XVI.

That the court did not give the law correctly upon the subject of insanity as produced by drunkenness, making the charge upon that subject prolix, abstract, misleading, and argumentative, and in effect arguing the defense of drunkenness out of this case.

XVII.

That the court did not give the law correctly upon the drunkenness producing a condition where the grade of crime would be reduced from murder to manslaughter.

XVIII.

That the court did not give the law correctly upon the subject of dying declarations, being argumentative and misleading.

XIX.

That the court did not give the law correctly, saying that Annie Maledon was brought here an eye-witness, coloring her dying declarations in behalf of the prosecution.

84 Whereupon the jury retired to consider of their verdict, and afterwards, on the 12th day of May, 1896, returned into court the following verdict:

"We, the jury, find the defendant, Frank Carver, guilty of murder as charged in the within indictment.

"F. C. MAXEY, *Foreman*."

And be it further remembered, that afterwards, on the 12th day of June, 1896, the defendant being brought to the bar of the court, the court pronounced the sentence of death upon him, to which judgment and sentence the defendant at the time excepted, and was given until the 29th day of July, 1896, to prepare and file a bill of exceptions, which the defendant here tenders and prays that the same may be signed and saved to him and made a part of the record in this cause, which is accordingly done.

(Signed) I. C. PARKER,
United States District Judge,
Presiding in the Circuit Court at the time it tried the above-entitled cause.

(Endorsed:) Filed July 29th, 1896. S. Wheeler, cl'k. By I. M. Dodge, D. C.

85 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs. No. 126. Murder.
FRANK CARVER.

The defendant in the above-entitled cause, Frank Carver, files this his assignment of errors on the trial of said cause, to wit:

First. The court erred in permitting the so-called written dying statement of deceased, Anna Maledon, to be read in evidence to the jury, for the reason that the proper foundation was not laid to show that said Anna Maledon, when she made said statement, was in extremis and under the apprehension of immediate dissolution, and for the further reason that it was not a dying declaration, because she lived about two months afterwards.

Second. The court erred in admitting oral testimony of the dying declaration of deceased, Anna Maledon, when a written statement had been offered purporting to have been made by her as her dying declaration and was read as such declaration.

Third. The court erred in admitting the so-called dying declaration as a whole, when a larger portion of said statement so offered was hearsay and immaterial and irrelevant and incompetent as not applying to the killing itself.

86 Fourth. The court erred in permitting the assistant district attorney, over the objection of the defendant, to make proof by his witness Lizzie Flynn that a Catholic priest was sent for Anna Maledon, and she took the sacrament after she was shot and performed the last rites of the Catholic Church; for the reason that the so-called dying statement had then been introduced and read to the jury, and said evidence of taking sacrament, etc., was incompetent and calculated to prejudice the jury, and apparently was offered by the prosecution to bolster up the case against def't.

Fifth. The court erred in permitting the district attorney, over the objection of the defendant, to prove by his witness Mike Flynn that he, Mike Flynn, went after Father Ketcham, the Catholic priest, for Anna Maledon after she was shot; and to the pressing inquiries made by the court of the witness as to his knowledge of the Catholic religion, and that Anna Maledon was a Catholic, thus having the effect to bolster up the Government's case and prejudice the jury and impress the jury with the belief that the said so-called dying declarations were true, and that they should the more readily believe them.

Sixth. The court erred in refusing to permit the defendant to prove by his witness' Mary Belstead and Mary Murray the declarations of defendant, and what he said to Anna Maledon and she to him at the place of the fatal shot immediately after said shot was fired, for the reason that the same was part of the res gestæ, and was part of the same conversation which had been given in evidence by Government witnesses J. W. Hays and Richard Brame.

Seventh. The court erred in refusing to allow defendant to prove by his witness Thomas Wilson the statement made to him by Anna Maledon the second morning after she was shot, in relation to how she was shot, going to show that defendant did not shoot her intentionally, for the reason that the Government having offered a written statement or declaration made by her as to the manner of the said shooting, then the defendant had the right to prove any other statement made by her contradicting the statement so introduced by the Government. 87

Eighth. The court erred in refusing to allow defendant to prove by his witness Matilda Wilkey that Anna Maledon told witness the next day after she was shot by defendant that defendant did not shoot her intentionally, and to permit defendant to prove by said Matilda the statements of said Anna Maledon to her next day after the shooting to the effect that the shooting was not intentional and that defendant did not shoot her a purpose.

Ninth. The court erred in refusing to allow defendant to prove by his witness Clarence Owensby a statement as to the facts of the shooting made to him by Anna Maledon at the depot at Fort Smith, Ark., after she was shot and was on her way to St. John's Hospital, Fort Smith, Ark., which statement would have tended to show that the alleged shooting was not done a purpose, but was accidental and not intentional.

Tenth. The court erred in permitting the prosecuting attorney, over the objection of the defendant, to examine Lizzie Flynn, a Government witness, on redirect-examination, recalled by defendant, about one Frank Walker coming to see the deceased Anna Maledon as an admirer, and as to a supposed telegram from Walker to Anna before the shooting, and as to how long Anna and Walker were friends, because the same was incompetent.

88 Eleventh. The court erred in permitting the prosecuting attorney, over the objection of the defendant, to examine John Campbell, a Government witness, in the presence and hearing of the jury, and state in presence of the jury that said Campbell was put on the stand to prove that Andy Crittenden, a former defendant's witness, was in the penitentiary, and that the prosecuting attorney was permitted to make such statements in presence of the jury. Because, if it could have been a competent fact to prove Crittenden's conviction, then the record of the same was the best evidence, and not oral testimony. And that it was not competent evidence and was calculated to prejudice the jury against the defendant's case to permit the statement in presence of the jury.

Twelfth. The court erred in its charge to the jury, by saying:

"Now, what amount of care does the law require when a man is handling a dangerous and deadly weapon? The amount of care, you will observe, is always in proportion to the extent of the danger. If the danger to life is very great, because of the character of the weapon, or the manner in which it is used, the degree of care is proportionately great, because the great object of this preserving and protecting power called the law is to protect innocent human life either against carelessness or recklessness, or against that which is prompted by a specific design, or from a specific purpose. Therefore, if a man does not exercise that reasonable care which he can exercise under the circumstances, when handling firearms, his act passes out of that classification known as accident. It is not an accident. It is a crime. It has intent connected with it. It is a crime of some kind. That is what is meant by an accident.

89 "All cases where human life has been taken, outside of an accidental killing, are cases where intent exists. They are denominated by the law as intentional. The law says if a man with a gun or pistol uses it willfully or intentionally, in such manner as to produce death, the production of death is regarded as a willful act, or the death is willful, the death is intentional. It means that, if it be a case where a shooting has occurred, and the man shoots intentionally or purposely, if he kills intentionally he does such killing willfully. You find he does it in that way by the manner in which it is done. That is the way you may find it, and it is the only way you can find it, because his purpose, of course, is a condition of the mind, and you can find it shadowed forth by the way he acts, by his conduct, by the nature of the action done by him."

Thirteenth. The court erred in its charge to the jury by saying:

"There is nothing in the conduct of the party killed, in this case Annie Maledon, at the time of the killing, which can be taken into account under the law to mitigate that act or to reduce the grade of it from murder to manslaughter. You have, then, a state of case which shows the doing of a wrongful act without just cause or excuse, or in the absence of facts which reduce the grade of the crime resulting in death.

"The law says, again, that this characteristic is defined and known as a condition which indicates that the party who does the killing does it in such a way as to indicate that he had a heart void of social duty and a mind fatally bent upon mischief. That is to say, if he did the killing so wantonly, so recklessly, and so wickedly as to indicate that he threw off these responsibilities which are upon all of us, and which grow out of the social duty we owe our fellow-men.

90 Fourteenth. The court erred in its charge to the jury by saying:

"If he conceives the thought to take life at the time he takes it, and thereupon takes it, and he does it without just cause or excuse, or in the absence of provocation or mitigating facts, facts which reduce the grade of the crime, he has thought of it sufficiently long to show premeditation, because he must have thought, he could not act unless he thinks, and the very fact he thus acts indicates that he premeditates.

"'From the very fact of a blow being struck, we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant. We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. Put thus baldly, the statement of the proposition is hardly fair to the defendant. It is true, if that is all the evidence in the case, proven the death, proven the slaying with a deadly weapon, and stopping there, we are warranted in inferring malice, and therefore finding the crime to be murder.'

"That is, when a state of case is presented where the simple fact that death has been produced by violence, by the violent act of another, is established, so that we are authorized, if there is nothing else shown, to find the existence of malice aforethought."

Fifteenth. The court erred in its charge to the jury by saying:

"If there is a killing done without malice aforethought, and is yet a crime, that crime is known as manslaughter, because manslaughter is defined by the law as the killing of a human being willfully and intentionally, but without malice aforethought, in the absence of that which shows that the party had a mind fatally bent upon mischief, or had a heart void of this social duty, or where there is an absence of that wanton, reckless, and diabolical wickedness as going to characterise the killing. If that is out of the case, and there is in it simply
91 the element which makes it a willful act in legal contemplation, it
is not an accident, but it would be known as manslaughter. Now, there could be no manslaughter in this case under the law unless there was that condition of drunkenness going to characterise the defendant at the time of the killing which would authorize you to take that condition into consideration and reduce the grade of the crime."

Sixteenth. The court erred in its charge to the jury, by saying:

"As I have already told you in this connection, to find malice aforethought it is not necessary to find motive. If you have motive you have a right to take it into consideration. It the better enables you to see what the condition of the mind of the party was, because sometimes we may be led into a state of doubt as to what was the condition of the mind when we have nothing before us but the bare act of shooting, but if we have a mental condition which leads up to that and produces it, it is a fact which is competent, we are authorized to take it into account, and it may produce the conclusion more satisfactorily than if that state of case did not exist.

"Judge Landon, in his charge delivered in a case tried at Saratoga, the case of Jesse Billings, for murder, said:

"'I first speak of motive. No man commits a crime without some motive leading him to do it. That motive may seem to be strong or weak. You are not to inquire whether the motive is one which would ordinarily lead to the commission of the crime charged. It is difficult for the mind that is fortified by the consciousness of its own rectitude to conceive of an adequate motive for any crime. No motive will lead an entirely just man to the commission of any crime. You could not be moved to take the life of your fellow-man except in the just defense of your own lives or rights, or the just defense of the rights and lives of those whom it is your duty to defend. But just defense is no crime. You may, however, properly inquire what motives do lead to the commission of crimes. And you will find where men's consciences and morals are depraved they are often lead into the gravest of crimes by the simplest of motives. A small sum of money, a word spoken in anger or insult, wrongs real or imaginary, revenge, jealousy, hatred, envy, and malice often lead to the crime of murder.'

92 "These are proper things to be taken into account to see whether the party contemplated the act, to see whether he thought of it beforehand, to see whether he took it into consideration before he did the act, not that that is necessary, because, if he conceived the purpose to kill at the time of the slaying, and executed that deadly purpose at that time in consequence of a deadly design then and there conceived by him, and there is nothing in the case to show that he had a right to do that, nothing in the case arising from the conduct of Annie Maledon, in this case, that you take into account to mitigate that crime, that would show malice aforethought as arising from the deliberate and willful act which resulted in her death, and you might find it from that act alone; but, I say, you may take this condition into account, you may take his motive into consideration for the purpose of the better enabling you to tell whether it was deliberately and premeditately done, and then for the purpose in this case, of enabling you to see whether these threats were intentional. If there is a motive for the threats, if they are made along such a line, or if they go to characterise such a course of conduct as to indicate that there was a cause for making the threats, because of their execution they become competent to enable you to say what weight is to be attached to them.

"A word or two further upon the subject of motive.

"The law says that 'a man unaccustomed to control his passions and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion until he determines that only the blood of the supposed offender can relieve the pang. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational. The motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor. Very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill, so that an inheritance might be theirs. When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraint.'

93 "Reason is dethroned by passion. The mind is not normally controlled. It is controlled by something which is not the proper ruler of it, and the man consequently becomes a criminal. He commits a crime because of his mental condition. Now, it is exactly that condition which shadows forth the existence of malice aforethought, and we may see it as it is shadowed forth by the light of these circumstances, by the light of these facts which are given to us.

"A word or two further upon this subject. You will bear in mind that to the existence of malice aforethought special spite is not necessary. A man may kill another because of special spite, grudge, or ill-will arising from jealousy, or some other motive."

Seventeenth. The court erred in its charge to the jury by saying:

"It is claimed for the defendant in this case that at the time he did the act of killing he was drunk. It becomes necessary, therefore, to tell you what figure drunkenness may cut in a case; how far you may relieve a man of a crime growing out of the taking of human life because he was drunk, and I call your special attention to this proposition. The proposition has had deliberate consideration in this court many times. It has often been before the Supreme Court of the United States. It was before that court recently in a case tried here, where the party was convicted of murder for shooting a woman—the case of the United States v. Marshal Tucker. That case went to the Supreme Court. I shall read to you a part of the charge upon the subject of drunkenness, and the doctrines enunciated by this court upon that subject were affirmed by the Supreme Court of the United States.

"Mr. Bishop, in his New Criminal Law, section 401, says:

"'The law divides indictable offenses into murder and manslaughter, but the specific intent to kill is not necessary to either. A man
94 may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime, and the doctrine is that the intention to drink may fully supply the place of malice aforethought, so that if one voluntarily becomes too drunk to know what he is about, and then with a deadly weapon kills another, he commits murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from each act its indictable quality.'

"That is the doctrine upon the subject as contained in that authority. I read to you, briefly, from the case of Marshal Tucker, passed upon by the Supreme Court of the United States, upon that point, and then I will read to you substantially the charge given in this case by the court below. The Supreme Court, referring to a previous case decided by it, wherein the question of drunkenness was also involved, the case Haupt v. Utah, 104 U. S., 631, said:

"'In Hopt v. People (104 U. S., 631), this court recognized the general rule that, at common law, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence; and went no further in favor of admitting evidence of intoxication than to hold that a defendant indicted under a Territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition, by reason of drunkenness, as to be incapable of deliberate premeditation.

"'No act of Congress has established degrees of the crime of murder. By the common law, neither deliberate premeditation, nor express malice or intent to kill, is required to make an unlawful homicide murder, but malice may be implied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter. It has often been held, and was formerly considered to be settled law, that a wanton killing without provocation could not, by reason of being done by a man voluntarily intoxicated to any degree not amounting to insanity, be excused, or reduced from murder to manslaughter.'

"That is the language of the Supreme Court of the United States in the Marshal Tucker Case which went up from here.

"We now come to the charge delivered by the court here in that case, which reviews the doctrine fully upon the subject of drunkenness, and tells you what figure it may cut in a case. It is claimed in this case, as it was in that, that the defendant was intoxicated at the time he killed Annie Maledon, or shot her. That makes it necessary, 95 as I have already told you, that I should give you the doctrine of the law upon that subject, and tell you what figure drunkenness cuts in the case. We must be governed in this respect by the law, as in all other respects, because we have no business outside of the law. When we are called upon to enforce it we must observe its rules. When we have found these rules which it gives us we are to be governed by them. We can not escape that. And there is no reason in this case why the rules of law should be perverted one way or another. They should be followed strictly. Now, the rule varies but little in this country and England, from the law of which country it is derived, and I call your attention to the rule of that country as recently proclaimed by the courts there in the case of Regina v. Davis, quite a recent case in English jurisprudence, and which contains so excellent an exposition of the law as it is understood in that country that we can not refrain from quoting it in full. The facts in that case were that Davis, aged 38, was charged with feloniously wounding his sister-in-law, Jane Davis, with intent to murder her. If he had killed her he would have been charged with murdering her, because in attacking another with intent to murder him is but one step from murder, and the only difference there is, in one case the party does kill and in the other he does not. If a party is charged with shooting with intent to murder another that means he did it with malice aforethought—that he did it willfully and with malice aforethought.

"'He had been previously drinking heavily, but on the day of the attack was sober. He threw her down and attempted to cut her throat with a knife. Usually he was a very mild, quiet, peaceable, well-behaved man and on friendly terms with her. When at the prison he said: "The man in the moon told me to do it. I will have to commit murder or I must be hanged." Two medical men, after examining him, testified that he was suffering with delirium tremens, resulting from overindulgence in drink. They said he would know what he was doing, but his actions would not be under his control. In their opinion neither the fear of

punishment nor legal nor moral consideration would have deterred
96 him. Nothing short of actual physical restraint would have prevented his doing as he did; that he was disordered in his senses and would not be able to distinguish between moral right and wrong at the time of the commission of the act. He recovered in a week and was then perfectly sensible.

"'His counsel claimed that he was of unsound mind at the time of the commission of the act and was not responsible for his actions.'

"Now, of course, an unsound mind, so as to take away responsibility, means insanity. That is what it means—insanity. An unsound mind, so as not to be responsible at all, means that a man is insane, because that is the only degree of unsoundness that the law recognizes as one that commonly excuses a man from an act which results in death which otherwise would be criminal.

"'Judge Stephen charged the jury as follows: "The prisoner at the bar is charged with having feloniously wounded his sister-in-law, Jane Davis, on the 14th day of January last, with the intent to murder her. You will have to consider whether he was in such a state of mind as to be thoroughly responsible for his actions. And with regard to that, I must explain to you what is the kind of degree of insanity which relieves a man from responsibility. Nobody must suppose—and I hope no one will be led for one moment to suppose—that drunkenness is any kind of excuse for crime. If this man had been raging drunk, and had stabbed his sister-in-law and killed her, he would have stood at the bar guilty of murder beyond all doubt or question; but drunkenness is one thing and the disease to which drunkenness leads are different things; and if a man by drunkenness brings on a state of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible."'

"That is a condition of insanity. He has delirium tremens. He loses his mind. He is then insane, just the same as if he would lose it from taking any other narcotic, or any other stimulant, or lose it by means of a blow on his head, or anything else. The test is whether he had lost his mind so far as not to know whether it was a right or wrong act that he was doing at the time. That is insanity. Of course, when that is produced, as this great English jurist remarks, by intoxication, it is just like insanity produced from any other cause. A man may be insane from birth, or he may be insane from a blow on his head. The test is whether or not he knew right from wrong at the time of the doing of the act with reference to that particular act.

97 "'In my opinion, in such a case, the man is a madman, and is to be treated as such, although his madness is only temporary.'

"He is giving the law concerning the defense of insanity. A little further on he continues:

"'A person may be both insane and responsible for his actions, and the great test laid down in McNaughton's Case (10 Cl. & F., 200; 1 Car. & K., 130n), was whether he did or did not know at the time that the act he was committing was wrong. If he did, even though he were mad, he must be held responsible; but if his madness prevented that, then he was to be excused. As I understand the law, any disease which so disturbs the mind that you can not think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action, any disease which so disturbs the mind that you can not perform that duty with some moderate degree of calmness and reason, may be fairly said to prevent a man from knowing that what he did was wrong. Delirium tremens is not the primary but the secondary consequence of drinking, and both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act.'

"I will now call your attention to a leading American case where the principle is laid down as to what figure drunkenness cuts in a case.

"One of the leading cases in this country upon this subject is The People v. Rogers (18 N. Y., 9). Rogers was indicted for killing another with a knife, and on the trial evidence was introduced, without objection, to show the prisoner was drunk at the time of the murder. His counsel requested the court to charge the jury that drunkenness would reduce the crime to manslaughter, which request was refused. In speaking of the maxim that drunkenness is no excuse for crime, the court said:

"'It will * * * occur to every mind that such a principle is absolutely essential to the protection of life and property. In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order than to an accurate discrimination as to moral qualities of individual conduct. But there is in truth no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is the duty which everyone owes to his fellow-men and to society, to say nothing of more
98 solemn obligations, to preserve, as far as lies in his power, the inestimable gift of reason. If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable.'

"That has reference to a state of insanity.

"'But if, by a voluntary act, he temporarily casts off restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society.'

"I will now read you the law as declared in a case tried in the State of Tennessee:

"'Another leading case upon this subject is Cornwell v. State (Mart. & Y., Tenn., 147). This is an earlier case than People v. Rogers by thirty-one years. The prisoner was convicted of murder, and urged his intoxication as an excuse. To this it was answered:

"'"Three cases of conviction for murder have been brought before this court at the present term, in which the prisoner was defended in the court below on the ground of madness, occasioned by drunkenness; and yet in neither does it seem to us was there a colorable foundation for such a defense. This court would be remiss in the performance of their duty if they did not, under these circumstances, declare the law explicitly on this most important subject. In the argument of these cases very untenable positions have been assumed, and very dangerous doctrines have been announced by counsel. And, from what was stated by some of these counsel, those doctrines have been repeatedly urged, and sometimes sanctioned in the courts below. It has become fashionable of late to discourse and philosophise much on mental sanity and insanity. New theories have been broached, and various grades and species of mania have been indicated. Some reasoners have gone so far as to maintain that we are all partial maniacs. Whatever difference of opinion there may be as to the construction and operation of the mind of man, whatever difficulty in discovering the various degrees of unsoundness, it is only necessary for us to ascertain the kind of prostration which is requisite to free a man from punishment for crimes by the law of the land. It is with this alone we have to do. We put our feet in the tracks of our forefathers. Let us, then, for a moment resort to the sages of the law of different ages, and learn from them whether that species of frenzy which is produced by inebriety constitutes an*d* excuse for crime, and what sort of insanity it is which will serve this purpose."'

"After reviewing the English authorities the court proceeds as follows:

"'In order to be clearly understood we have supposed the strongest case, a case of entire prostration of intellect immediately occasioned by drunkenness, and have said that that constitutes no excuse. Instances, however, of heinous offences committed under such circumstances are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what
he thinks when sober.

99 "Another case on this subject often quoted and cited is Choice
v. State (31 Ga., 424, decided in 1860, quoted approvingly in Goodwin v. State, 96 Ind., 550, 579), the opinion being delivered by Chief Justice Lumpkin, that legal luminary of the South. He said: 'Whether anyone is born with an irresistible desire to drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capit*t*ally doubt whether it can ever be. And if it were, how far this crazy desire for liquor would excuse from crime it is not for me to say. That this controlling thirst for liquor may be acquired by the force of habit until it becomes a sort of a second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immutably, and from it nothing can dislodge me but an act of the legislature, namely, that neither moral nor legal responsibility can be avoided in that way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more nor less than this: That a want of will and conscience to do right will constitute an excuse for the commission of a crime, and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrongdoing. If this doctrine be true—I speak it with all seriousness—the devil is the most irresponsible being in the universe. For, from his inveterate hostility to the Author of all good, no other creature has less power than Satan to do right. The burglar and the pirate may indulge in robbing and murder until it is as hard for an Ethiopian to change his skin as for them to cease to do evil; but the inability of Satan to control his will to do right is far beyond that, and yet our

faith assures us that the fate of Satan is unalterably and eternally fixed in the prison house of God's enemies. The fact is, responsibility depends upon the possession of will, not the power over it.'

"There it is exactly. Responsibility depends upon the possession of will, and not the power over it.

"'If a man destroys his power over his will, if he still has will, he is responsible.

"'Nor does the most desperate drunkard lose power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will when he takes his cup. It is for the pleasure of the relief of the draught that he takes it. His intellect, his appetite, and his will all work rationally, if not wisely, in his guilty indulgence, and were you to exonerate the inebriate from responsibility you would do violence both to his consciousness and to his conscience, for he not only feels the self-prompted use of every rational power involved in accountability, but he feels, also, precisely what this new philosophy denies, his solem' and actual wrongdoing in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, just compose him so as to reach his clear, constant experience, and he will confess that he realizes his guilt, and therefore the responsibility of his conduct. A creature made responsible by God never loses his responsibility save by some sort of insanity. There have always existed amongst men a variety of cases wherein the will of the transgressor is universally admitted to have little or no power to dictate to return to virtue. But mankind have never in any age of the
100 world exonerated the party from responsibility, except when considered to have lost rectitude of intellect by direct mental aberration.'

"Again, reading from the case of People v. Ferris, from the State of California:

"'No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in such a condition. The fact of intoxication alone, as it is declared by a well-settled rule of law, is no excuse for the commission of crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated. And drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution.'

"You will learn presently how far it may be considered for the purpose of reducing the grade of the crime. I am calling your attention now to this degree of drunkenness which produces insanity, a fixed condition of the mind where the man is no longer responsible, where he is no longer capable of discerning right from wrong with reference to the particular act done. Then, of course, the party is excused, not upon the ground of drunkenness, because that is only the cause which produces that condition, but upon the ground of insanity.

"'Great caution,' Mr. Wharton says, 'is undoubtedly necessary in the application of this doctrine, for, as has already been remarked, there are few cases of premeditated violent homicide in which the defendant does not previously nerve himself for the encounter by liquor, and there would in future be none at all if the fact of being in liquor at the time is enough to disprove the existence of premeditation. The true view, therefore, would seem to be, not that the fact of liquor having been taken is of any value at all on the question of malice, but that when there is no evidence of premeditation aliunde, and where the defendant is proved at the time of the occurrence to be in a state of mental confusion of which drink was the cause, the fact of such mental confusion may be received to show either that there was no specific intent to take life or that there was no positive premeditation.

"'To disprove malice, voluntary drunkenness is irrelevant.'

"It can not be used for that purpose.

"'It can not be taken into account for the purpose of showing an absence of premeditation if the proof, and the whole proof, shows the doing of a deliberate act, a premeditated act.'

101 "That is to say, you take into consideration the evidence. You look to see whether threats were made, whether they were of a deliberate character, whether in pursuance of these threats the shooting occurred, and as a consequence Annie Maledon was killed. If so, then you have evidence of premeditation. There may have been a state of drunkenness affecting the defendant. He may have been excited by liquor. The defendant may have been under the influence of drink at the time, but if there is still a premeditated purpose to kill, as evidenced by the threats, as evidenced by the spirit of jealousy, as evidenced by the selection of the weapon, as evidenced by the manner of the killing, you have a state of case which shows premeditation, shows there is absent from that condition known as the killing that which would reduce the grade of the crime, and thus to acquit a party until it produces insanity, and then insanity may be used for that purpose. Nor can it be used to reduce the grade of the crime unless it produces a condition in the mind of the party where he is incapable of thinking. Now, that is the test, as I will give you presently. If he was in a condition of mind at the time he was so acting—at the time of the killing—that his mind was so disturbed by drink—by a drunken condition—so that he was incapable of forming any intent, or an intent to do a wrongful act which might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder; but, in the language of the law I have read to you, great caution is to be used by the jury in making application of this principle, because voluntary intoxication, although it may inflame the mind of the party, although it may excite the mind of the party, although it may prompt him the more readily, the more quickly, to do a reckless or wanton act, if it is a state of case where he has a deliberation of purpose, where he has pre-
102 meditation of purpose enough to draw and present and fire a deadly
weapon, which results in the taking of the life of another, intoxication in such a condition as that is not a mitigating fact, unless that intoxication goes to the extent to put the mind of the man in the condition that the mind of a man was put in this State, where he was excused

under the law declared by the supreme court of this State on the ground that he was incapable of having any intent, of forming any conclusion. When a man is in a condition where he can form an intent to do a willful act which may result in death, and he does deliberate and form that intent, as evidenced by the threats made, as evidenced by the selection, the drawing, presenting and firing of the deadly weapon, then intoxication does not mitigate his offense. If he is carried beyond that, although he may not be absolutely insane, so his will power is gone, he has no control over it so he can restrain it, while there may not be insanity, then there is an absence from the case of that which is denominated by the law as malice aforethought. That contemplates the existence of a state of facts where he is incapable of forming a deliberate design—forming a consecutive purpose, first making threats to execute that purpose and then executing those threats.

"That is the figure which drunkenness cuts in a case, and I do not think it is necessary to detain you longer upon that."

Eighteenth. The court erred in its charge to the jury by saying:

"There are but few other things to be said in this case, and they pertain to the evidence which has been offered here. You have had offered before you what is called dying declarations of the deceased, Annie Maledon, declarations made under the apprehension of death. The law contemplates that that apprehension—the contemplation of the fact
103 that the party is soon to be ushered into eternity and be made responsible for everything said—that it is so impressive in its character upon the human mind that it takes the place of an oath and a cross-examination in court; that it takes the place of those means to secure truth, and it does even more than that, because the human mind is so constituted that if there is ever a time when it is impressed with the consciousness of truth it is at that time. Every element which it possesses converges toward that point, and for that reason it declares when they are found by the court to be such, to be made under the apprehension of death, they may go to the jury as competent evidence in regard to the manner of the occurrence and the details of the circumstances which led up to it and to how it was executed at the time.

"'The admission of this testimony is justified upon the ground of necessity and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose.'

"Now, in regard to this sort of evidence, as it is with all other items of testimony, it is well to see whether there are any other circumstances corroborating it or not, any other facts that corroborate it in the shape of the location of the wound, the place where the wound was inflicted, and the condition of the clothing upon the person of the girl at the time she was shot, and any statements of any other witnesses as to facts which existed as surrounding that transaction. These things are all to be taken into account to see whether they corroborate the statement of the dying woman or the woman who made them under the apprehension of death. If they do, they are strengthened as any other testimony is strengthened. If they do not corroborate it, that testimony stands upon its own inherent strength, upon its own consistency, its own probability, its own naturalness. It may be of itself sufficient to establish the manner

104 in which the killing occurred. But then you are to gather up all the accusatory facts, all the accusatory circumstances, and see what they tend toward showing, what conclusion they tend to produce."

Nineteenth. The court erred in its charge to the jury by saying:

"Now, you will bear in mind, in this case, if you are satisfied beyond a reasonable doubt, under the law I have given you and according to this evidence as you have received it, that the crime of murder has been committed it is your duty to say so. You have no right to say something else than that when you are convinced beyond a reasonable doubt that that is the true state of case. You would be perverting the purpose of the law as much to find manslaughter here, if you are satisfied under the law and by the evidence that manslaughter does not exist, but that murder exists, as though you were to acquit of all crime. This woman, though she may have been a fallen woman, a woman of lewd character, she was still under the protection of the law, and so far under its protection that she could not be wrongfully, improperly, and illegally robbed of her life. Her life could not be taken away in that manner because she was that kind of a woman. She could only forfeit it by crimes committed by her which are declared by the law of such a character as to warrant a forfeiture of human life. She stands before you entitled to the full measure of the law's protection, and not only that, but she, as well as the living, is entitled to a full vindication of this law; if it has been violated, a vindication of it to the fullest measure to which it has been violated.

"You are the judges of the credibility of this evidence and of all of it. You are to take into consideration the interest witnesses have in the case, their manner of testifying, the fact as to whether they
105 have made statements at other times different from what they may have made upon the stand."

Twentieth. The court erred in its charge to the jury by saying:

"The defendant goes upon the stand and makes his statements. You take them for what they are worth, in the light of his condition, in the light of his relation to the case, and, above all, in the light of the other facts. If the other facts contradict him, or other facts establish a state of case that what he asserts does not establish, you have a right to look at that evidence in the light of the other facts, in the light of the other testimony, in the light of the other evidence which has gone before you from these witnesses."

Twenty-first. The court erred in its charge to the jury by saying:

"Gentlemen, the law says if you are satisfied beyond a reasonable doubt of the truth of this charge, your duty is to convict of that crime you may be satisfied the party has committed. If you are satisfied, as twelve reasonable men, to the extent that you have an abiding faith to a moral certainty that the crime of murder has been committed, your duty is to find the defendant guilty of that crime. If you find this crime has not been committed, but the other has, your duty would be to convict of that. If you believe no crime has been committed, if you are not satisfied that a crime has been committed to the extent required by the law I have named, then you would be required to acquit.

"Every person charged with a crime starts into the trial with the presumption in his favor that he is innocent. That presumption remains with him until it is overcome by the proof offered on the part of

106 the Government. It is overcome when the case is proven beyond reasonable doubt.

"You understand what is meant by reasonable doubt. It means the proof of these several propositions, the one showing that Anna Maledon is dead, that she died of violence of the kind named in the indictment, that that violence was inflicted by the defendant, and that it was inflicted in such a way as to make it criminal violence. If they have been established so you, as reasonable men, are so satisfied of the truth of them that you would be willing to act upon a conclusion formed by you relating to any other great concern or great affair in life which you are called upon to first pass judgment upon and then act upon that judgment, that is all that is meant by proving a case beyond a reasonable doubt, so that it satisfies a reasonable man to that degree of certainty that he can say he believes the truth of the charge, and then take whatever action duty calls upon him to take in regard to that belief, or as growing out of that belief. That is proof beyond a reasonable doubt, and when the case is established in that way it makes the crime. When there is a failure to establish it to that extent there is a failure to prove crime."

Whereupon, the errors above stated being considered, the said defendant prays that the said judgment and sentence against him be reversed and a new trial be granted to him.

FRANK CARVER.
By J. WARREN REED,
His Attorney.

(Endorsed:) Filed July 30th, 1896. S. Wheeler, clk. By I. M. Dodge, D. C.

107 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs. } No. 126. Murder.
FRANK CARVER.

I do solemnly swear that I am the identical Frank Carver tried and convicted at the May term, A. D. 1896, of the circuit court of the United States for the western district of Arkansas of the alleged crime of murder; that I am now under sentence of death in said court.

That I am prosecuting a writ of error under sec. 6, chapter 113, of "An act to abolish circuit court powers of certain district courts of the United States and to provide for writs of error in capital cases, and for other purposes."

That I am poor and utterly unable to pay the costs of prosecuting said writ of error, not being possessed of property of the value of twenty dollars or of any value whatever.

So help me God.

(Signed) FRANK CARVER.

Subscribed and sworn to before me by Frank Carver, this 23rd day of July, 1896.

(Signed) STEPHEN WHEELER, *Clerk.*
By J. D. BERRY, *D. C.*

(Endorsed on back as follows:) "Filed 7, 29, '96. S. Wheeler, clk. By I. M. Dodge, D. C."

108 In the United States circuit court for the western district of Arkansas.

UNITED STATES
vs. } No. 126. Murder.
FRANK CARVER.

To the Clerk of the Circuit Court of the United States for the Western District of Arkansas:

Your petitioner, Frank Carver, respectfully represents that at the May term, A. D. 1896, of this court, he was convicted on the indictment, No. 126, charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that, in the record and proceedings in the trial of petitioner's cause in said court, there is great and manifest error to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under seal of said circuit court in said cause, removing the same and the record therein to the said Supreme Court in order that the same may be there reexamined, and if error be found that the said judgment and sentence against him therein may be reversed.

(Signed) FRANK CARVER.
By J. WARREN REED,
His Attorney.

(Endorsed on back as follows:) "Filed 7, 29, '96. S. Wheeler, clk. By I. M. Dodge, D. C."

109 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the United States circuit court for the western dist. of Arkansas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States, plaintiff, and Frank Carver, defendant, a manifest error hath happened, to the great damage of the said Frank Carver, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30' day of July, in the year of our Lord one thousand eight hundred and ninety-six.

STEPHEN WHEELER,
U. S. Circuit Clerk for the Western Dist. of Arkansas.

Allowed by
I. C. PARKER,
U. S. District Judge, holding Circuit Court.

110 UNITED STATES OF AMERICA, *ss:*

To the United States, western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Frank Carver, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. I. C. Parker, United States district judge for the western district of Arkansas, this 30' day of July, in the year of our Lord one thousand eight hundred and ninety-six.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Crt.

I hereby accept service of the above citation, this 30' day of July, 1896

JAS. F. READ,
U. S. Atty. for the West. Dist. of Ark.

111 UNITED STATES OF AMERICA,
Western District of Arkansas.

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true copy of the record and proceedings in the case of U. S. vs. Frank Carver, the original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 12' day of August, A. D. 1896.

[SEAL.]

S. WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 16367. Term No. 588. Frank Carver, plaintiff in error, vs. The United States. W. Arkansas, C. C. U. S. Filed August 17, 1896.

164-[illegible]

In the Supreme Court [illegible]

October Term, [illegible]

Frank [illegible], petitioner,

v.

The United States.

MOTION [illegible]

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

STEPHEN WHEELER,
U. S. Circuit Clerk for the Western Dist. of Arkansas.

Allowed by
I. C. PARKER,
U. S. District Judge, holding Circuit Court.

110 UNITED STATES OF AMERICA, *ss:*

To the United States, western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Arkansas, wherein Frank Carver, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. I. C. Parker, United States district judge for the western district of Arkansas, this 30th day of July, in the year of our Lord one thousand eight hundred and ninety-six.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Ct.

I hereby accept service of the above citation, this 30th day of July, 1896

JAS. F. READ,
U. S. Atty. for the West. Dist. of Ark.

111 UNITED STATES OF AMERICA,
Western District of Arkansas.

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true copy of the record and proceedings in the case of U. S. vs. Frank Carver, the original of which remains of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 12th day of August, A. D. 1896.

[SEAL.]

S. WHEELER, *Clerk.*
By L. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 16367. Term No. 588. Frank Carver, plaintiff in error, vs. The United States. W. Arkansas, C. C. U. S. Filed August 17, 1896.

164-694

Office Supreme Court U. S.
FILED.
OCT 7 1896
JAMES H. McKENNEY,
CLERK

164-694

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

FRANK CARVER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 588.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

FRANK CARVER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 588.

MOTION TO ADVANCE.

This is a second conviction, in the circuit court of the United States for the western district of Arkansas, of the plaintiff in error here under an indictment charging him with the murder of one Anna Maledon on March 28, 1895, at the Creek Nation, in the Indian country, the judgment of the lower court on the former conviction having been reversed and the cause remanded with directions to set aside the verdict and grant a new trial. (160 U. S., 553.)

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on the counsel in the court below for the defendant, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

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164-694

Office Supreme Court, U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

....IN THE....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

FRANK CARVER, *Appellant*,
vs.
THE UNITED STATES, *Appellee.*

No. ~~1~~ 588.

BRIEF FOR APPELLANT.

In Error to the Circuit Court of the United States for the Western Dietrict of Arkansas.

....IN THE....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

FRANK CARVER, *Appellant*, *vs.* THE UNITED STATES, *Appellee.*	*No. 126.*

In Error to the Circuit Court of the United States for the Western Dietrict of Arkansas.

STATEMENT OF CASE.

The appellant, Frank Carver, was convicted of the crime of murder for the killing of Anna Maledon on the 25th of March, 1895, at Muskogee, in the Creek Nation, Indian Territory.

The appellant, at the time of the alleged killing, was about twenty-five years old, and the deceased, Anna Maledon, was about 22 years old. Appellant had come with his parents to the Indian country when about ten years old, and they had resided mostly ever since.

Appellant had been married to a Miss Murray of Muskogee, about seven years, by whom he had two children, and they had been separated about four years and did not live together, and were expected to obtain a divorce in sort of mutual way. Some time after this separation, appellant came to Fort Smith, Arkansas, on business, where deceased had always lived, her father having been the hangman for the United States Criminal Court. at Fort Smith, Arkansas, some fifteen or twenty years, and he met deceased, who was not a chaste woman, and they formed an attachment for each other that lasted during all deceased lifetime,

After the first meeting at Fort Smith, Ark., appellant and deceased were together most all the time. and she did not seem to associate with other men ; appellant supported her and kept her about him, wherever he went, and they were expecting to be married when a divorce could be obtained by appellant. During this time they went to Colorado, remaining about one year. living together as man and wife, very contentedly and affectionately, where he worked as a farm hand on a ranch, and she done the cooking for the ranch hands.

(See testimony of John Wilkey, type record below, page —.

They had returned to Muskogee some half year or more before the killing, but in the meantime made several trips together to Texas and other places where he went on business, and everything between them had always gone smooth, affectionate and harmonious,

Appellant was addicted to strong drink, and would take his sprees, remaining drunk some times several days. or weeks, while she would take care of him, and endeavor to keep him sober.

For several days just preceding the alleged killing, appellant had been on a protracted drunk. Under the treaty no whisky is sold in the Indian Country openly, and it mostly would have to be obtained from bootleg peddlers, and to supply the place of whiskey, appellant would often drink Jamaica ginger; bitters and other alcoholic preparations calculated to impair and derange his mental powers,

The day preceding the killing that night, appellant had been drinking whiskey in the morning, and ran out, and later in the day, and down till a short time before the alleged killing had been drinking hard cider and Jamaica ginger mixed, and was in a beastly state of intoxication and mental derision. (See testimony of John Wilkey, type record below, pages —— ——

see also testimony of Lizzie Carver, type record, pages 110 to 111, who says appellant was so crazy drunk he was falling as he came out of the gate.

In the afternoon appellant had seen deceased, and arranged a meeting with her after dark, as was their custom to do when they wanted to be together.

After appellant had drank up four bottles of Jamaica ginger that evening and about dark of the said same day, March 25, 1895, appellant went and met deceased near the stock yards in Muskogee and they were together awhile and she left him and went to Flinn's, where she had been, and returned a little later and joined appellant again, and they had gone to one Bill Looney's. Up to this time there was no discord between them; they were there with Looney's family, friendly and affectionate as usual, and they remained at Looney's but a short time and went on to old man Duncan Wilkie's, who kept a little provision store and cider, and where appellant had got his cider during the day to mix with Jamaica ginger drink.

Soon after appellant had reached Duncan Wilkie's store, Alexander says that appellant was very drunk, or to use his language, "as drunk as a man could stand on his feet, and not accountable for much," and took out his pistol, (he being in the habit of carrying a pistol), and flourished it about in Wilkie's store-room, and when ordered by Wilkie to put it up, done so, but made no threats of violence toward deceased, or any other person.

Appellant by this time being in such a drunken, crazy condition, was unfit to take care of deceased and accompany her home; she requested Crittenden, with whom she was acquainted, to take her home.

Soon deceased, Crittenden and appellant left the said store, going on back to Bill Looney's where Crittenden had first seen them, and went in while Crittenden waited at the gate, but soon returned, and Crittenden going on again with them at the request of deceased, appellant walking between them, and deceased holding him up assisting him to walk. After getting about fifty yards, appellant again got out his pistol, flourishing it about—fired it off twice, once in the air and once in the ground, and again put it up. Going on across the railroad, appellant again took out his pistol, but being told by Crittenden to put it up or he would take it from him, done so, but made no threats of violence toward anyone.

(See Buck Roger's testimony, type record below, pages 181 to 183).

Some fifty yards or more further on, appellant again took out his pistol and was flourishing it about when Crittenden stepped around deceased and got hold of appellant behind, deceased stepping away some ten or fifteen feet. While Crittenden was scuffling with appellant to get the pistol from him, turned the latter around in the scuffle, when the pistol fired, striking deceased in the back as she moved away. Crittenden recovered the pistol from appellant and deceased sank down and hallooed for help, requesting Crittenden to go for friends to take care of her. While this was being done, appellant, like a wild or crazy man, but not as a criminal, ran off some little distance and returned some three times to deceased, appellant doubtless shocked by the occurrence, which had the effect to sober him to some extent and restore his reason; talked to the deceased in the most tender and endearing words; raised her from the ground; kissing her and weeping over her; and lamenting was heard by two young ladies, who ran out on hearing the cries of the deceased. There appellant asked deceased who shot her, showing that he did not psoress sufficient reason at the time it was done, and knowledge of the transaction to know how or by whom she was shot. In a bewildered way appellant moved off a little distance and was taken immediately and lodged in jail; and some three hours later was found asleep by witness Cole, and knew not that deceased was shot until next morning, when he was informed so at the jail.

The dying declaration of deceased, offered in evidence, is interspersed in one breath with tender and endearing language, by reference to which type record, pages 6 and 7, deceased says that appellant said in tender language: "*Honey*, you are in for it tonight," and in the next breath, he would kill her before morning. These expressions of love and tenderness, intermixed with threats, were the most conclusive evidence of a deranged and disordered mind. Going further into her declaration, she said: "A fellow came up the track and appellant threw his pistol on him and ordered him to leave." And as appellant's mind in its wild, rambling, crazy condition, could not pursue one subject for an instant, "he turns," she says, "and shoots among a lot of cattle."

Deceased had been with appellant in his drunken and deranged sprees many times before, and knew that his wild, drunken talk and threats meant nothing, and that he did not know or comprehend what he said; this conclusion is inevitable and sure, because if deceased had really felt that she was in any danger from appellant at that time, help was at hand; there was the man on the track; plenty of people living near, and she could have made an outcry for help. Many things in her statement, when closely compared, are corroborative of our claim for the defendant. From the facts in the case the appellant should not have been convicted of murder.

BRIEF AND ARGUMENT

We have not been furnished with the printed record of this case from the Supreme Court, and will, therefore, be unable to make any reference thereto. The references and paging herein will be made to the type written record furnished in the court below.

No reference will be made to the first, second or third assignment of errors.

We submit by the fourth and fifth assignment of errors, that the conrt erred by giving undue prominence to the dying declaration of deceased, Anna Maledon, as evidence, by permitting it to be proven by the prosecution and interrogating witnesses himself, to prove (over the objection of the defendant), that Anna Maledon before her death, had embraced the Catholic religion and received the last rites of the church, or extreme unction from the Catholic priest.

Anna Maledon, if she had been living at the time of the trial, was a competent witness to have gone on the stand as a witness against the defendant for shooting her on a charge of less grade than murder.

The shooting by the defendant having caused her death, then her dying declaration when the proper foundation was laid was competent evidence against defendant, but the dying declaration takes the place of the testimony of the witness who is dead, and is to be received in evidence in place of the living witness and in the light of all the surrounding circumstances of the case. If the witness was living and offered and examined by the government, then, no evidence could be offered by the government to support the character of such witness for truth and veracity, until the defendant, should by evidence, attack the general character of such witness for truth and veracity.

When the dying declaration of Anna Maledon was offered by the Government and decided by the court to be competent (over the objection of the defendant), and read to the jury, then at no subsequent stage of the case as it stood, was it competent for the prosecution to prove, or the court to inquire, as to the religion of Anna Maledon, or if she had religion, or anything about her religion?

This was only an indirect way of bolstering up the dying declaration of Anna Maledon by impressing the jury with her religion that they might the more readily believe her said dying declaration, and thus was it indirectly proving her character for truth and veracity by showing that she possessed one of the traits of a good charcter, to-wit: religion, when the defendant had not, nor could not at that stage of the case, attack her character.

About all the testimony of the Government witness Lizzie, *alias* Maggie Flinn, was to prove that Anna Maledon was a Catholic, and had taken the last rites of the church, etc., and this was after the dying declaration had been offered and read. Also the testimony of Mike Flinn had been introduced (over the objection of the defendant), showing that Anna Maledon had sent him for the priest, etc., and the court argued with the witness, Mike Flinn, the different phases of the Catholic religion. and made it prominent before the jury that Anna Maledon, (though two days after making her dying declaration before McClure) had accepted from the priest the last rites of the church, etc.

This was error in the court and calculated to mislead the jury and prejudice them in favor of the Government's case, and make them give more faith and credit to the dying declarations of Anna Maledon than by the law should have been given them.

We submit by the sixth assignment that the court erred in refusing to permit defendant to prove by his witnesses, Mary Belstead and Mary Murray, the declarations of defendant, and what he said to Anna Maledon and she to him, at the place of the fatal shot immediately after said shot was fired, for the reason that the same was part of the *res gestae* and was part of the same conversation which had been given in evidence by Government witnesses, J. W. Hays and Richard Brame.

It will be seen by reference to the testimony of J. W. Hays and Richard Brame, introduced by the Government, that they heard some shots fired at a distance of a hundred and fifty yards or more, and went soon to the place, and testified as to what Anna Maledon said while lying there on the ground wounded, and what defendant said also, which was admitted by the court as part of the *res gestae*.

The defendant offered Miss Mary Belstead and Mary Murray, who were up that night with a sick woman and were out getting water, and heard Anna Maledon begin to halloo and scream, and they ran immediately toward the place where Anna was lying to within about fifty yards of where she lay screaming, and there heard the conversation between defendant and deceased, Anna Maledon, as to the shooting, and heard some other persons talking there, (which must have been Government witness, J. W. Hays), to Anna Maledon, as stated by him in his testimony. This certainly, from the circumstances and the nature of the case, was immediately after the shooting, and was the same talk or conversation detailed by Government witnesses, Hays and Brame, was part of the *res gestae* and should have been admitted as evidence for the defendant as declarations forming part of the *res gestae* as being part of the same conversation given by said Hays and Brame, on the part of the Government, and to us it seems that this was clearly an error in the court refusing to allow the testimony of Miss Belstead and Miss Murray to go to the jury.

By the eighth assignment we submit that the court erred in refusing to allow defendant to prove by his witness, Thomas Wilson, that the second morning after she was shot that Anna Maledon made a statement to him to the effect that the shooting was accidental and not intentional, etc.

This testimony we submit was clearly admissible on either of two grounds.

First: As a dying declaration, because as the proof then stood when it was offered, F. T. McClure, the first witness for the Government, had shown that he and Dr. Fite had gone to Anna Maledon in the afternoon of the next day after she was shot, and that the Doctor had told her she could not live, that she would die, and that McClure had then and there taken a written dying declaration from her, and fearing that they had not made it quite plain enough to her, returned the second day after she was shot, and took a second written sworn dying declaration from her, which was introduced in evidence and relied on by the Government as evidence.

In the meantime, on the second day after the shooting (and on the same day of said last written dying declaration), said defendant's witness, Wilson, went to see Anna Maledon and she made the statement to him, which was offered and excluded.

(See testimony of Thomas Wilson, written record.)

The Government had laid a foundation upon which the statement made by Anna Maledon to McClure on the second day after she was shot, had been admitted in evidence on the part of the Government, and the statement made to defendant's witness, Thomas Wilson, was clearly admissible on the same ground as a dying declaration, and should have been admitted.

Second: The testimony of Thomas Wilson was clearly admissible on a second ground, to-wit:

The Government having offered and read in evidence to the jury the dying declaration of deceased, Anna Maledon, which tended to show that the shooting of her was intentionally done by defendant, then as to said declaration so read in evidence, it stood the same as if Anna Maledon had been living and gone on the stand as a witness and testified orally. The only difference between Anna Maledon testifying orally in court and testifying through her written dying declaration is, that in the first case, if defendant sought to contradict her by showing that she had made contradictory statements at other times a foundation would have to be laid by fixing the time and place, and ask her if she had made such contradictory statements. While in the latter case, said Anna Maledon being dead and not in court (only by her dying statement), such contradictory statements made by her while living, either before or after making her dying statement, was admissible without such foundation.

A statement made out of court by a witness contradictory to his testimony given in court, is always admissible to contradict, and thus impeach his testimony given in court. And the Government having offered and read the dying declaration of Anna Maledon, then any other statements made by her at other times while she lived, was proper evidence to have gone to the jury to contradict her said dying statement, and thus weaken and impeach such dying declaration.

The eighth assignment refers to the testimony of Matilda Wilkey, which was excluded by the court on the same ground (over the objection of defendant) and from which it will be seen that Matilda Wilkey had gone to see Anna Maledon the next evening after she was shot, which was after McClure and Dr. Fite's first visit and before their second visit to her and between the times that McClure took the two written statements from her. Then the testimony of F. T. McClure laid a sufficient foundation for the testimony of Matilda Wilkey and it should have been admitted as a dying declaration. But the testimony of said Matilda Wilkey was also clearly admissible on the latter ground stated for the admission of the testimony of Thomas Wilson.

We submit by the ninth assignment that the testimony of Clarence Owensby was clearly admissible on the latter ground, also for the admission of the testimony of Thomas Wilson as heretofore argued.

We submit by the tenth assignment that it was error to permit the prosecuting attorney, over defendant's objection, to examine Lizzie Flinn on her re-direct examination about one Frank Walker coming to see deceased, Anna Maledon, as an admirer, and as to a supposed telegram from Walker to her. This telegram was in no sense admissible as evidence, and if it could have been, then the telegram itself was the best evidence.

The remarks of the court in this connection that, "It was competent to show her relations with Walker for the purpose of showing this killing," was misleading, argumentative and calculated to bias and prejudice the jury against the defendant.

We submit by the eleventh assignment, that it was error to permit the prosecuting attorney to interrogate John Campbell, over the objection of defendant, with reference to the whereabouts of Andy Crittenden, a former defendant's witness, and that he was in the penitentiary.

(See John Campbell's testimony, printed record.)

This was incompetent testimony and calculated to prejudice the jury, and it was error in the court to permit any reference to Crittenden's conviction, and that he was in the penitentiary, in the presence of the jury. And further, that if it could have been tenentable to have shown such conviction of Crittenden, then the record of his conviction was the best evidence.

The 13th assighment calls attention to certain language of the court, wherein it is expressed in substance, that there is nothing in this case showing such conduct on the part of deceased as to reduce the grade of crime from murder to manslaughter, and after making this statement, the court says:

"Then you have a state of case which shows the doing of a wrongful act, without just cause or excuse, or in the absence of facts which reduce the grade of the crime which resulted in death."

The court probably intended to say that such was the case unless there were other elements, or propositions, which excused defendant. But we find nothing of that kind in the extract as quoted in the assignment. The language of the court was sufficiently explicit and forcible to convey to the minds of the jury the understanding that they were required, under the law, to find the defendant guilty of murder. While the court has a right to express its opinion as to the weight of the testimony, yet the final question of whether a crime is proven must be left to the jury. We submit that the language of the court does not meet that requirement.

Without considering the fourteenth assignment, we will call attention to the language of the court as set forth in the latter part of the fifteenth. The court says:

"Now, there could be no manslaughter in this case, under the law, unless there is that condition of drunkenness going to characterize the defendant at the time of the killing that would authorize you to take that condition into consideration and reduce the grade of the crime."

This language of the court takes away from the consideration of the jury the qestion of there being such a state of negligence as to make a case of manslaughter. The court, however, did give the law as to the negligent use of deadly weapons. The defendant asked no instructions upon any point, and as the court undertook to give the law of negligence as applied to a homicide, it was beyond its province to say to the jury that there was nothing but drunkenness in the case, which would reduce the grade of the crime.

Referring to the extract from *Wharton's Criminal Law, Sec. 343*, and subsequent pages, it will be seen that manslaughter frequently grows out of a negligent use of dangerous agents.

We have not the printed record before us, (it not having been furnished), to ascertain whether any reference is made in any part of the charge, to a state of case where the crime of manslaughter may grow out of the negligent use of fire-arms. But, however that may be, the language of the court in this assignment is sufficiently strong to obliterate from the minds of the jurymen any recollection of it.

The objection to the sixteenth assignment is to the doctrine of elimination as a means of ascertaining guilt, as discussed in the extract from the charge quoted in this assignment, and which is so often given by the lower court. We contend that such an instruction reverses the correct rule which a jury should adopt in passing upon a case. The existence of malice aforethought is an affimative allegation in the indictment. It must be established by satisfactory proof, and we submit that a jury should not first ascertain if there is any self-defense in a killing and if none, then inquire as to manslaughter, and if there is none, take what is left and call it malice aforethought and murder.

The seventeenth assignment is quoted the entire portion of the charge of the court upon the subject of drunkenness, as an excuse for crime. This court in the case of Tucker vs. United States, in substaece establishes the proposition that unless drunkenness has gone to that extent where it has produced insanity, temporarily at least, it is no excuse for crime except in cases wherein specific intent is a necessary element of crime charged, and then drunkenness may be considered as far as reducing the grade of the crime.

The propositions have been quite clearly presented by the trial court in the language quoted in this assignment, but there are other things discussed by the court in this extract which we consider objectionable.

The court reads from a California case: People vs. Ferris, the following extract: "No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in that condition."

The rule there given is in direct conflict with the proposition that drunkenness may be used to reduce the grade of the killing from murder to manslaughter. It says that an act is "None the less criminal" by reason of intoxication, which is not correct as a proposition of law, and although the court did in other places express the law correctly, the extract had a tendency to mislead the jury.

The following language from the extract quoted in this assignment is objectionable. When has a person premeditation of purpose enough to draw, present and fire a deadly weapon, which results in taking the life of another, intoxication in such a condition as thet is not a mitigating fact, unless that intoxication goes to the extent to put the mind in the condition that the mind of a man was put, in this state where he was excused under the law declared by the supreme court of this State, on the ground of insanity, because he was incapable of having any intent of forming any conclusion."

The trial court says there is no mitigation from murder to manslaughter, if he draws, presents and fires, a deadly weapon. Might not these very things have to be done in a case where the law holds that drunkenness had reduced the grade of the crime. Suppose a man draws, presents and fires a gun, but is so much intoxicated that he is unable to form a specific intent to produce the results which are usually produced by acts of that kind, would the killing not be reduced to manslaughter? Following the language of the trial court: If a man draws, presents and fires a deadly weapon, he could never be convicted of manslaughter, by reason of being too much intoxicated to form a specific intent.

Language similar to that above quoted, will be found more than once in the extract from the charge set forth in this assignment.

We submit by the twentieth assignment that the court erred in its charge by reflecting upon the testimony of the defendant by saying that the "Defendant goes upon the stand and makes his statements. You take them for what they are worth, in the light of his condition, in the light of his relation to the case, and above all, in the light of other facts, etc." The law makes the defendant a competent witness in his own behalf, and his testimony was to be viewed by the jury, and was a reflection on his testimony for the court to say that "They should take his statements for what they are worth."

Against defendant's testimony this language we believe comes within the holding of this court in the case of John Allison vs. United States, Vol. 140, Supreme Court Reports, page 395, and is reversible error. The other assignments will not be considered.

All of which is respectfully submitted.

WM. M. CRAVENS,
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STATEMENT.

Carver shot his mistress, Anna Maledon. She lived some time, and died from the wound. About half past 8 the night of the killing he told her he was going before daylight to kill her and one Walker. He was jealous of Walker. He drove a man off at the point of the pistol who came up while he was threatening the woman. He threatened several times to kill her before morning, putting his pistol in her face. (Rec., pp. 7, 8, 11.)

He shot her in the back as she stepped away while he was threatening to kill her. (Rec., pp. 7, 8.) She and Carver were the only witnesses to the shooting who testified. Crittenden must have seen it, but was not a witness. The Government undertook to account for his absence, but the proof, being objected to by the defense, was not made. (Rec., pp. 26, 27.)

After the shooting, Carver ran away some distance, started back, and then away again. He was captured, carried back to where she was, and then said, "Anna, who shot you?" "Annie, you won't prosecute me, will you?" (Rec., pp. 8, 11.)

Defendant had been drinking jamaica ginger and cider, which mixture appears, from the proof, to be very potent. (Rec., pp. 11, 14, 15, 18, 22, 23.)

The proof hardly sustains in its entirety the statement in the brief (p. 3) that "appellant was addicted to strong drink, and would take his sprees, *remaining drunk* sometimes several days or weeks, while she would take care of him and endeavor to *keep him sober*," and that he was in a state of "mental derision."

The defendant denied all knowledge of the shooting. (Rec., p. 25.) There was no evidence that the pistol was discharged accidentally.

Carver was found guilty of murder, and sentenced to be hanged. (Rec., p. 4.)

POINTS AND ARGUMENT.

The first, second, third, twelfth, fourteenth, eighteenth, nineteenth, and twenty-first assignments are abandoned in the brief filed for plaintiff in error.

I.

Fourth and fifth assignments.

The fourth and fifth assignments, treated of on pages 8–10 of the brief for plaintiff in error, are as follows:

> Fourth. The court erred in permitting the assistant district attorney, over the objection of the defendant, to make proof by his witness, Lizzie Flynn, that a Catholic priest was sent for Anna Maledon, and she took the sacrament after she was shot, and performed the last rites of the Catholic Church, for the reason that the so-called dying statement had then been introduced and read to the jury, and said evidence of taking sacrament, etc., was incompetent, and calculated to prejudice the jury, and apparently was offered by the prosecution to bolster up the case against defendant. (Rec., p. 49.)

The evidence of *Maggie* Flynn (R., 9–10) is doubtless meant.

> Fifth. The court erred in permitting the district attorney, over the objection of the defendant, to prove by his witness, Mike Flynn, that he, Mike Flynn, went after Father Ketcham, the Catholic priest, for Anna Maledon after she was shot, and to the pressing inquiries made by the court of the witness as to his knowledge of the Catholic religion, and that Anna Maledon was a Catholic, thus having the effect to bolster up the Government's case and prejudice the jury and impress the jury with the belief that the said so-called dying declarations were true, and that they should the more readily believe them. (Rec., p. 49.)

It is insisted in the brief for plaintiff in error "that the court erred by giving undue prominence to the dying declaration of the deceased" by admitting evidence of the fact that she had sent for a Catholic priest and had taken the last rites of the church.

The reason for admitting a dying declaration is the supposition that a person will, under a sense of impending death, speak the truth. This rests upon a belief in a future state of reward and punishment, and it is a proper inquiry whether or not the deceased was a believer or disbeliever in the doctrines of Christianity, and whether or not certain rites were performed by the church to which the deceased belonged, only in contemplation of death.

II.

Sixth assignment.

The sixth assignment of error, treated of on pages 10 and 11 of the brief for plaintiff in error, is as follows:

> The court erred in refusing to permit the defendant to prove by his witnesses, Mary Belstead and Mary Murray, the declarations of defendant and what he said to Anna Maledon and she to him at the place of the fatal shot immediately after said shot was fired, for the reason that the same was part of the *res gestæ* and was part of the same conversation which had been given in evidence by Government witnesses J. W. Hays and Richard Brame. (Rec., p. 49.)

What was offered to be proven by the testimony of Mary Belstead and Mary Murray was not a part of the *res gestæ*, and was properly excluded.

The proof shows that after Carver shot the woman he ran away, then went back toward the woman, " then came again," and that *he was captured* 30 yards from where the woman was, and *was taken back to her*.

In the meantime one Hays had gotten to her. It was after all this occurred that Carver asked her who shot her. (See testimony of Bailey and Brann, Rec., p. 11.)

It was after all this had transpired that Mary Belstead and Mary Murray went to the woman. Mary Belstead testified that she did not remember whether or not she heard the pistol shot. She said she heard the screaming, and went after she heard it "within about 50 yards of the woman screaming." She does not say that she heard the first outcry that the woman made. Evidently she did not, for she does not remember to have heard the shot. Some interval must have elapsed, for Hays was 150 yards away when he heard the shot, and had gotten to the woman, and Brann had captured the defendant and taken him back, and all this occurred before Mary Belstead and Mary Murray got within 50 yards of where the woman was screaming. (See testimony of Mary Belstead and Mary Murray, Rec., pp. 14, 15.)

The testimony was excluded by the court because it was not a part of the *res gestæ*, and this action was clearly right. A sufficient interval of time had elapsed for the defendant to reflect and make a self-serving statement.

The admission or rejection of evidence as part of the *res gestæ* lies largely within the sound discretion of the court. (*Alexander* v. *United States*, 138 U. S., 356–57.)

The case of *Little* v. *Commonwealth* (25 Grattan, 923), often cited, was decided on the peculiar facts of the case.

In that case the prisoner walked away from the place of shooting, but "in a minute, in a second," came back. The defense offered to show by a witness that he at that time made a statement. An objection was made, the statement was excluded, and the reported case does not show what it was. The Supreme Court reversed the case on the ground that the testimony "might well have been in whole or in part admissible evidence, either for or against the prisoner."

The court said:

> It was very ~~closely~~ connected, both in time and place, with the homicide, which was the subject of the prosecution, and might well have tended to elucidate that fact as part of the *res gestæ*. * * * It is not probable that the prisoner had either time or motive to fabricate a statement under such circumstances. There were present on that occasion those who were eyewitnesses to the homicide and who could disprove any misstatement which the prisoner might have made in regard to it. As the Commonwealth did not, as she might have done, produce those eyewitnesses to testify upon the trial, it seems to be more reasonable on that account that the statement made by the prisoner at the time of the transaction should not be excluded. At all events, that statement ought to have been heard by the court below, so that that court might determine whether all or any part of it was admissible evidence, and this court might revise the judgment in that respect. We certainly can not say *a priori* that no part of that statement could have been legal evidence. (925–6.)

Even if this case can be regarded as a satisfactory exposition of the law, it is very clear that the reasons which controlled the judgment of the court do not exist in the case at bar.

The rule is that if declarations of a past occurrence are made under such circumstances as will raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestæ*. (A. and E. Enc. L., vol. 21, p. 102.)

In *Keyes* v. *State* (122 Ind., 527), a reply made by the defendant a quarter of a minute after the shooting, in response to a question from his wife, was held to be competent as part of the *res gestæ*.

In *O'Shields* v. *State* (55 Ga., 696) it was decided that *res gestæ* embraced the sayings of the parties within two or five minutes after the transaction which resulted in the homicide, and before preparation for defense could probably have been in the mind of the party speaking.

The declaration of a party after he had gone 200 yards from the scene of the shooting to a party who had not been a witness of it that the shooting was accidental was excluded in *State* v. *Seymour* (1 Houst. Cr. Cas. (Del.), 508).

Mr. Greenleaf, in his work on Evidence (vol. 1, sec. 108, note *b*), says that the current of decisions in the United States is that declarations may be admitted as part of the *res gestæ* if they are so connected with the fact in issue as to qualify or characterize or explain it, although not strictly contemporaneous with it. (See cases there cited.)

At any rate the defendant was not prejudiced, for Hays and Brann had both proven all that was sought to be shown by Mary Belstead and Mary Murray. The defense only proposed to show by these two witnesses that Carver said, "Oh, Anna, who shot you?"

Hays testified that, at the very time in question, "the defendant asked her who shot her."

Brann testified that, at the very time in question, defendant said to her, "Anna, who shot you?"

This proof had been made by the Government, and it was not contradicted by anyone. At most, the proposed testimony of Mary Belstead and Mary Murray was cumulative in respect of an undisputed fact. It was competent for the Government to make this proof as declarations of the defendant. It was not competent for the defendant to make such proof, unless it was part of the *res gestæ*. Why it was excepted to, inasmuch as the same proof had been put in by the Government, is not apparent, but, even if it had been competent, it is absolutely impossible that its exclusion could have, in the least, prejudiced the defense.

It is said on page 11 of the brief that the evidence ought to have been admitted "as being part of the same conversation" proven by the Government.

This insistence is without force, for the reason that the Government proved the entire conversation, and there was no offer to prove any part of the conversation which was not already in evidence.

III.

Seventh assignment.

The seventh assignment of error, treated of on pages 11 to 14 of the brief for plaintiff in error, and erroneously called "the eighth assignment," is as follows:

> The court erred in refusing to allow defendant to prove by his witness, Thomas Wilson, the statement made to him by Anna Maledon the second morning after she was shot, in relation to how she was shot, going to show that defendant did not shoot her intentionally, for the reason that the Government having offered a written statement or declaration made by her as to the manner of the said shooting, then the defendant had the right to prove any other statement made by her contradicting the statement so introduced by the Government. (Rec., p. 49.)

There was no ground of exception stated. (R. 16). The point above made is set up for the first time in the assignment of error.

It is insisted that the testimony was admissible on two grounds—first, as a dying declaration, and, second, as an impeachment of Anna Maledon.

First. The brief (p. 12) mixes up the time of the introduction of the evidence at the trial with the order of events connected with the giving of the dying declaration.

It says it was admissible "as a dying declaration, because as the proof *then stood* as it was offered, F. P. McClure, the first witness for the Government, had shown that he and Dr. Fite had gone to Anna Maledon in the afternoon of the next day after she was shot, and that the doctor had told her she could not live," etc.

The determination of the admissibility of this evidence does not depend upon how "the proof then stood when it was offered," but upon the fact whether or not the proof showed that at the time the statement was made the declarant believed she was going to die.

There is no evidence whatever going to show that this statement, if ever made, was made at a time when Anna Maledon believed she would not recover.

Wilson testified that she made the statement to him "on Wednesday morning after she was shot." (Rec., p. 15.)

The proof did not show at what time of day this statement was made. There was no offer to prove the time. The testimony was excluded, and exception was taken, but no ground therefor was stated. (Rec., p. 16.)

The evidence in the case showed that she made the dying declaration that was introduced in evidence on the 27th of March, which was the second day after she was shot and the same day on which Wilson said she made a statement to him. (Rec., p. 6.) At the time she made the dying declaration she was informed that she could not recover. (Rec., p. 6.) She had made a statement the day before, but that was not introduced in evidence, for the reason that she had not been informed, when it was given, that she could not recover. (Rec., p. 6.)

Thus there is no evidence in the record tending to show that she knew or believed she was going to die, before the time when she was advised of that fact, which was just antecedent to her making the dying declaration put in evidence. There was nothing to show that the interview with Wilson was before this time.

The brief states (p. 12):

> In the meantime, on the second day after the shooting (and on the same day of said last written dying declaration), said defendant's witness, Wilson, went to see Anna Maledon, and she made the statement to him, which was offered and excluded.

It is not even suggested that there is any evidence fixing this interview with Wilson at a time subsequent to the giving of the dying declaration.

Second. It was not competent to introduce this evidence as an impeachment of Anna Maledon.

There was nothing in the proposed proof which contradicted any of the facts stated by her in her declaration. It was not proposed to prove any statement made by her of the facts that had occurred. It was confined to a mere proof of her opinion bearing upon the question of intent. The only fact contained in it was as to whether or not he was drunk. Her dying declaration said nothing on this subject. (Rec., pp. 7, 8.)

All that she stated about the shooting in her dying declaration was, "That's where he shot me. He shot me in the back as I went to step across to Andy." (Rec., p. 8.)

She did not say that he shot her intentionally, that the shooting was not accidental, or that defendant had done it purposely.

There was no dispute as to who shot her. That was an uncontested fact in the law suit. The defense did not deny the shooting, but rested on the ground that he was not responsible. Therefore the facts offered to be proven by Wilson did not in any respect contradict anything stated in the dying declaration.

In this view of the testimony it is not necessary to go into the question of law as to whether or not it is competent to contradict a dying declaration by other statements of the deceased, a question upon which the authorities are divided.

IV.

Eighth assignment.

The eighth assignment of error, treated of on page 14 of the brief for plaintiff in error, is as follows:

> The court erred in refusing to allow defendant to prove by his witness, Matilda Wilkey, that Anna Maledon told witness the next day after she was shot by defendant that defendant did not shoot her intentionally, and to permit defendant to prove by said Matilda the statements of said Anna Maledon to her next day after the shooting to the effect that the shooting was not intentional and that defendant did not shoot her a purpose. (Rec., p. 49.)

The brief shows that the statement proposed to have been proved by Matilda Wilkey was made on the day after Anna Maledon was shot. There is far less ground for admitting this testimony than that of Wilson. The brief says:

> Then the testimony of F. T. McClure laid a sufficient foundation for the testimony of Matilda

> Wilkey, and it should have been admitted as a dying declaration. (P. 14.)

There is nothing in the testimony of McClure (Rec., 5 to 7) which would lay the foundation for any statement made by Anna Maledon on the day after she was shot. It was because there was no such foundation that a statement made by her on that day was considered insufficient, and that another statement was taken on the following day, after she had been informed that she could not live. (Rec., p. 6.)

The testimony was objected to and excluded on the ground that it was not shown that the statement was made by Anna Maledon under the belief that she was going to die. (Rec., p. 16.)

V.

Ninth assignment.

The ninth assignment of error, treated of on page 14 of the brief for plaintiff in error, is in substance the same as the seventh and eighth. There was absolutely no proof whatever tending to show that Anna Maledon at or about this time believed she was going to die.

VI.

Tenth assignment.

The tenth assignment of error, treated of on page 14 of the brief for plaintiff in error, is as follows:

> The court erred in permitting the prosecuting attorney, over the objection of the defendant, to examine Lizzie Flynn, a Government witness, on

> redirect examination, recalled by defendant, about one Frank Walker coming to see the deceased, Anna Maledon, as an admirer, and as to a supposed telegram from Walker to Anna before the shooting, and as to how long Anna and Walker were friends, because the same was incompetent. (Rec., pp. 49, 50.)

The testimony of Lizzie Flynn appears on pages 18 and 19 of the record.

The dying declaration showed that Carver charged Anna Maledon with being intimate with Walker. (Rec., p. 8.)

The defendant proved by Lizzie Flynn that Walker came the morning after the shooting to the house where Anna Maledon was and remained there as long as she did. The Government then proved by the witness that he was a friend of Anna Maledon. The fact of his staying at the house until she left was brought out by the defendant.

There is nothing in the objection about the telegram, for the witness knew nothing about it, and no information in regard to it was elicited. (Rec., p. 19.) The character of these objections is somewhat illustrated by the following:

> The ASSISTANT DISTRICT ATTORNEY. Do you know whether Annie Maledon received a telegram from Walker on the day before?
>
> Mr. J. WARREN REED (counsel for defendant). I object. I don't care if she received a barrel of them.
>
> The COURT. It is competent to show her relation with Walker for the purpose of showing this killing——

Mr. J. WARREN REED (counsel for defendant). The telegram is the best testimony. Produce it. If you have got the telegram, produce it.

The ASSISTANT DISTRICT ATTORNEY. We have not got it.

Mr. J. WARREN REED (counsel for defendant). Neither have I.

The COURT. She can state whether she knows she received it or not. She can't state the contents of it.

Mr. J. WARREN REED (counsel for defendant). I object to that.

The COURT. Of course you do. (To the witness:) Do you know whether she received a telegram?

The WITNESS. She didn't, to my knowing.

The ASSISTANT DISTRICT ATTORNEY. Do you know how long she and Walker had been friends?

The WITNESS. No, sir.

Mr. J. WARREN REED (counsel for defendant). We object to that.

The COURT. That is all right, but it is competent.

Mr. J. WARREN REED (counsel for defendant). We object to that.

The COURT. That is all right, but it is competent.

Mr. J. WARREN REED (counsel for defendant). We save an exception to that.

The COURT. Yes. (Rec., p. 19.)

It will be discerned through the smoke of this combat that the witness said that she knew nothing about the telegram, and did not know how long Anna Maledon and Walker had been friends.

Nevertheless counsel objected and the court ruled that the evidence was competent, and exceptions were duly reserved.

VII.

Eleventh assignment.

The eleventh assignment of error, treated of on page 15 of the brief for plaintiff in error, is as follows:

> The court erred in permitting the prosecuting attorney, over the objection of the defendant, to examine John Campbell, a Government witness, in the presence and hearing of the jury, and state in the presence of the jury that said Campbell was put on the stand to prove that Andy Crittenden, *a former defendant's witness*, was in the penitentiary, and that the prosecuting attorney was permitted to make such statements in presence of the jury. Because, if it could have been a competent fact to prove Crittenden's conviction, then the record of the same was the best evidence, and not oral testimony. And that it was not competent evidence, and was calculated to prejudice the jury against the defendant's case to permit the statement in presence of the jury. (Rec., p. 50.)

This is based upon the following:

> Q. Where do you live?
> A. I live at Clarkesville, Ind. T.
> Q. Do you know Andy Crittenden?
> A. Yes, sir.
> Q. Do you know where he is now?
> A. No, sir.
> Mr. J. Warren Reed (counsel for defendant). I object. It is not material.
> The District Attorney. The only object is to show why he is not here, that he is about; and if the gentleman objects to it, I do not care to insist on it.
> The Court. Well.

> Mr. J. Warren Reed (counsel for defendant). I object to it.
>
> The District Attorney. We want to show that since the last trial of this case that——
>
> Mr. J. Warren Reed (counsel for defendant). We object to any statement about that in the presence of the jury.
>
> The District Attorney. I will not state anything that will prejudice the defendant. That he has been convicted and sent to the penitentiary. If you object to that——
>
> Mr. J. Warren Reed (counsel for defendant). I do.
>
> The Court. You offer to show it, and it is objected to?
>
> The District Attorney. Yes, sir. (Rec., pp. 26, 27.)

The sum of this seems to be that the district attorney offered to make certain proof by this witness, stating what it was, and that upon objection he did not make it.

The gravamen of the exception seems to be that Andy Crittenden was on a former trial *a witness for the defendant*. There is nothing in the record showing this fact or that any such intimation was made to the jury. From all that appears, he may have been a witness for the Government.

VIII.

Thirteenth assignment.

The thirteenth assignment of error, treated of on page 15 of the brief for plaintiff in error, is as follows:

> The court erred in its charge to the jury by saying: "There is nothing in the conduct of the party killed (in this case Annie Maledon), at the time of

> the killing, which can be taken into account under the law to mitigate that act or reduce the grade of it from murder to manslaughter. You have, then, a state of case which shows the doing of a wrongful act without just cause or excuse, or in the absence of facts which reduce the grade of the crime resulting in death.
>
> "The law says, again, that this characteristic is defined and known as a condition which indicates that the party who does the killing does it in such a way as to indicate that he had a heart void of social duty and a mind fatally bent upon mischief—that is to say, if he did the killing so wantonly, so recklessly, and so wickedly as to indicate that he threw off these responsibilities which are upon all of us, and which grow out of the social duty we owe our fellow-men." (Rec., pp. 50, 51.)

The brief ingenuously says:

> The court probably intended to say that such was the case unless there were other elements or propositions which excused defendant. *But we find nothing of that kind in the extract as quoted in the assignment* (p. 16).

This is quite true, but "the extract as quoted in the assignment" is taken out of its context. It appears upon page 31 of the record, and it is perfectly manifest that it was not intended as a statement of the facts of this particular case. The court was explaining the meaning of "malice aforethought," and said:

> There is another element of the crime of murder called malice aforethought. That means the doing of a wrongful act which results in death without just cause or excuse, or in the absence of facts which mitigate it. A man, in other words, takes a life

> willfully or intentionally, and there is nothing in the evidence to show he had a right to take it under the law. There is nothing in the conduct of the party killed—in this case Annie Maledon—at the time of the killing which can be taken into account under the law to mitigate that act or to reduce the grade of it from murder to manslaughter. You have then a state of case which shows the doing of a wrongful act without just cause or excuse, or in the absence of facts which reduce the grade of the crime resulting in death.
>
> The law says, again, that this characteristic is defined and known as a condition which indicates that the party who does the killing does it in such a way as to indicate that he had a heart void of social duty and a mind fatally bent upon mischief—that is to say, he did the killing so wantonly, so recklessly, and so wickedly as to indicate that he threw off these responsibilities which are upon all of us, and which grow out of the social duty which we owe our fellow-men. That is the very highest duty which rests upon us, and that duty is not to destroy human life, but to protect it. We are commanded to do it, to stand up in defense of it if it is innocent and in danger. When we so far forget that duty as to recklessly, wantonly, and wickedly slay, the law says that is malice aforethought, because it shows we have a heart void of this social duty, and a mind which does not recognize any longer the social duty resting upon us. We are doing, in other words, a wrongful, a wicked, a reckless, a wanton, a diabolical act which deprives a fellow-being of life. That is malice aforethought. (Rec., p. 31.)

The court only brought in the name of Annie Maledon incidentally, while discoursing upon the general proposition, and it is plain, taking that sentence in connection with what went before, that he was putting a hypothetical case, and was not stating the facts of this case. He used a condensed form of expression, but it could not have been misunderstood. It was plainly conditional, and meant—

> If "a man, in other words, takes a life willfully or intentionally and there is nothing in the evidence to show he had a right to take it under the law, if there is nothing in the conduct of the party killed—in this case Annie Maledon—at the time of the killing which can be taken into account under the law to mitigate that act or to reduce the grade of it from murder to manslaughter, you have then a state of case which shows the doing of a wrongful act without just cause or excuse," etc.

This construction is sustained by his charge on page 45, in which he left the finding of the facts to the jury and charged fully upon reasonable doubt and presumption of innocence.

If he had said that there was nothing in the conduct of Anna Maledon to reduce the grade of the crime it would not have been error, for there was not a particle of proof tending to establish any defense.

IX.

Fifteenth assignment.

The fifteenth assignment of error, treated of on pages 16 and 17 of the brief for plaintiff in error, is as follows:

> The court erred in its charge to the jury by saying: "If there is a killing done without malice aforethought, and is yet a crime, that crime is known as manslaughter, because manslaughter is defined by

> the law as the killing of a human being willfully and intentionally, but without malice aforethought, in the absence of that which shows that the party had a mind fatally bent upon mischief, or had a heart void of this social duty, or where there is an absence of that wanton, reckless, and diabolical wickedness as going to characterize the killing. If that is out of the case, and there is in it simply the element which makes it a willful act in legal contemplation, it is not an accident, but it would be known as manslaughter. Now, there could be no manslaughter in this case under the law unless there was that condition of drunkenness going to characterize the defendant at the time of the killing which would authorize you to take that condition into consideration and reduce the grade of the crime." (Rec., p. 51.)

The brief sets out only the last sentence and says it is erroneous because—

> This language of the court takes away from the consideration of the jury the question of there being such a state of negligence as to make a case of manslaughter. The court, however, did give the law as to the negligent use of deadly weapons. The defendant asked no instructions upon any point, and as the court undertook to give the law of negligence as applied to a homicide, it was beyond its province to say to the jury that there was nothing but *drunkenness* in the case, which would reduce the grade of the crime. (Brief, p. 17.)

The court, as will be seen from the whole passage, was stating the law in respect of a case of "willful and intentional" killing, one which had in it "the element which makes it a willful act in legal contemplation," one which "is not an accident." In respect of such a case, and in immediate connection with its statement, he stated what is objected to. The question of negligence was not under treatment, and it was only *if the jury should find the act willful* that the court went on to say that there could be no manslaughter under the proof as to drunkenness, unless it was shown to be of a certain character.

The brief (p. 17) admits that no request was made. He had previously charged upon the question of negligence (Rec., p. 29), and it is not insisted in the brief that there was any error in that portion of the charge. There was not a particle of evidence tending to show that the pistol was accidentally discharged, or that it was not aimed at the deceased. The defense was that he was so drunk that he was not responsible for his act, which otherwise would have been criminal.

X.

Sixteenth assignment.

The sixteenth assignment of error covers nearly two pages of the printed record. (Rec., 51–53.)

The brief (pp. 17–18) objects only to that part of the charge set out which contains "the doctrine of elimination as a means of ascertaining guilt." An examination of this assignment has failed to reveal what is objected to.

A charge containing the doctrine of elimination was approved in *Brown* v. *United States* (150 U. S., 94).

XI.

Seventeenth assignment.

The seventeenth assignment of error, treated of on pages 18 and 19 of the brief for plaintiff in error, sets out all that the court said upon the subject of drunkenness, which covers more than seven pages of the record. (Rec., pp. 53–60.)

It is admitted that the court gave a correct statement of the law upon drunkenness. (Brief, p. 18.)

The charge is assailed in the brief as follows:

> The court reads from a California case, *People* v. *Ferris*, the following extract: "No act committed by a person when in a state of voluntary intoxication is less criminal by reason of his having been in that condition."
>
> The rule there given is in direct conflict with the proposition that drunkenness may be used to reduce the grade of the killing from murder to manslaughter. It says that an act is "none the less criminal" by reason of intoxication, which is not correct as a proposition of law, and although the court did in other places express the law correctly, the extract had a tendency to mislead the jury (pp. 18–19).

This takes only part of the extract read. The extract from the California case proceeds:

> The fact of intoxication alone, as it is declared by a well-settled rule of law, is no excuse for the commission of crime. Insanity produced by intoxication does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated. And drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of

> crime, and for this purpose it must be received with great caution. (Rec., p. 42.)

Thus, while in the part quoted in the brief it is said that voluntary intoxication would not render an act less criminal, meaning thereby that it would not constitute a defense, the part omitted, and which immediately follows, states distinctly that evidence of intoxication is admissible "for the purpose of determining the degree," i. e., reduce the grade. Thus there is no conflict between this part of the charge and the other portion which the brief admits states the doctrine correctly.

The brief (p. 19) continues the criticism of the charge on drunkenness, and sets out a *portion* of a sentence, and that incorrectly. The passage, including the fragment, is as follows:

> If he was in a condition of mind at the time he was so acting, at the time of the killing, that his mind was so disturbed by drink, by a drunken condition, so that he was incapable of forming any intent, or an intent to do a wrongful act which might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder, but, in the language of the law I have read to you, great caution is to be used by the jury in making application of this principle, because voluntary intoxication, although it may inflame the mind of the party, although it may excite the mind of the party, although it may prompt him the more readily, the more quickly, to do a reckless or wanton act, if it is a state of case where he has deliberation of purpose, where he has premeditation of purpose enough to draw and present and fire a deadly weapon,

> which results in the taking of the life of another, intoxication in such a condition as that is not a mitigating fact, unless that intoxication goes to the extent to put the mind of the man in the condition that the mind of a man was put in in this State where he was excused under the law declared by the supreme court of this State on the ground that he was incapable of having any intent, of forming any conclusion. (Rec., p. 43.)

The brief begins at the words "premeditation of purpose," inserts before them, "When has a person," and in the latter part inserts the words "of insanity."

It says:

> The trial court says there is no mitigation from murder to manslaughter, if he draws, presents, and fires a deadly weapon (p. 19).

The court spoke of a state of case where he has *deliberation of purpose*, where he has *premeditation of purpose* enough to draw and present and fire.

XII.

Twentieth assignment.

The twentieth assignment of error, treated of on page 20 of the brief for plaintiff in error, is as follows:

> The court erred in its charge to the jury by saying: "The defendant goes upon the stand and makes his statements. You take them for what they are worth, in the light of his condition, in the light of his relation to the case, and, above all, in the light of the other facts. If the other facts contradict him, or other facts establish a state of case that what he asserts does not establish, you have a right

> to look at that evidence in the light of the other facts, in the light of the other testimony, in the light of the other evidence which has gone before you from these witnesses." (Rec., p. 61.)

The brief insists that this is obnoxious to the opinion in the case of *Allison* v. *United States* (160 U. S., 203).

There is no point of resemblance between the two charges.

In the Allison Case the court (p. 207) quoted approvingly from *Hicks* v. *United States* (150 U. S., 452), to the effect that the judge is warranted in cautioning the jury as to the testimony of the accused person.

This charge is fully sustained by the following cases:

Reagan v. *United States*, 157 U. S., 301.
Johnson v. *United States*, 157 U. S., 320.
Wilson v. *United States*, 162 U. S., 613.

J. M. Dickinson,
Assistant Attorney-General.